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IN THE

Supreme Court of the United States

October Term, 1973

Supreme Court, U. S.
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THE TRAVELERS INSURANCE COMPANY,
Petitioner,

v.

BLUE CROSS OF WESTERN PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NO. ....

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v.

BLUE CROSS OF WESTERN PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Travelers Insurance Company ("Travelers") prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit decided on July 10, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 481 F. 2d 80 and is attached hereto as Appendix A, infra, pp. 1a-11a. The final opinion of the United States District Court for the Western District of Pennsylvania is reported at 1972 Trade Cases ¶ 73,811 and is attached hereto as Appendix B, infra, pp. 12a-26a. Pretrial opinions of the District Court in this case denying two motions for summary judgment filed on behalf of the Defendant

are reported at 298 F. Supp. 1109 (Appendix C, infra, pp. 27a-32a and 306 F. Supp. 219 (Appendix D, infra, pp. 33a-35a).

JURISDICTION

The District Court rendered its judgment on January 6, 1972. The judgment of the Court of Appeals affirming the judgment of the District Court was entered on July 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The following are important questions of Federal law which have not been, but should be, decided by this Court, and which should move this Court to grant this petition:

1. The McCarran Act exempts the "business of insurance" from the application of the Federal antitrust laws to the extent that such business is regulated by state law. Blue Cross has been found to be in the business of insurance for the purposes of the McCarran Act, and the contract between Blue Cross and Western Pennsylvania hospitals, which is the center of contention in this case because it provides for a discount allowed only to Blue Cross, was "approved" by the Pennsylvania insurance commissioner. However, no state statute regulates the competitive behavior of Blue Cross or the competitive effect of the contract. Because the contract is subject to the general supervision of the insurance commissioner, the lower courts found the contract to be immune from the Sherman Act. The effect of the

rulings of the courts below is that all insurance companies (life, accident, health, etc.) in each state are free to engage in territorial allocation, mergers, price-fixing, monopolization, etc., if there is general supervision of insurance in that state under a state statute, even though the state statute is silent respecting these types of conduct. The scope of the McCarran Act exception to the Sherman Act has never been ruled upon by this Court on this point, and the crucial question is what type and extent of state regulation is required to produce exemption from the Sherman Act?

2. Section 1 of the Sherman Act prohibits contracts in "unreasonable restraint of trade." The courts below found the contract between Blue Cross and the hospitals to be "reasonable" because Blue Cross was out to "get the best deal possible" and this arrangement permitted Blue Cross to pass "along the saving thus realized to consumers." The District Court thought the contract to be "reasonable" from the standpoint of the parties who signed it. Is this the proper test of "reasonableness", or is the proper test whether the effect on competition is reasonable, without regard to the benefits to the parties or to a segment of the public?

3. The lower courts found that Blue Cross could not be guilty of monopolization under Section 2 of the Sherman Act because its monopoly power had been "thrust upon" it. Blue Cross and Travelers offer the same product in the same marketplace. The basic difference is the "guidelines" of the state insurance commissioner which require Blue Cross to reimburse hospitals at amounts less than the hospitals charge others. This results in Blue Cross being able to underbid its competitors. Thereby it has obtained its monopoly posi-

tion. When monopoly power results not from the "superior skill, foresight and industry" of the defendant, but from a procedure dictated to it from a state agency — and denied its competitors — is the monopoly power thus obtained "thrust upon" the defendant in the meaning of the antitrust laws?

4. Blue Cross has obtained a "superior competitive position" as a result of its contract with hospitals, which has placed its competitors at a substantial price disadvantage. The lower courts have held Blue Cross to be exempt from the antitrust laws because the contract which created its competitive advantage was approved by the state insurance commissioner under a Pennsylvania statute. Does this action by the state insurance commissioner, whereby Blue Cross has obtained its substantial competitive advantage, and which does not pertain to Blue Cross competitors, deny Blue Cross competitors due process and equal protection of the laws under the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §§ 1 and 2) provide in pertinent part:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Section 2(b) and 3(b) of the McCarran Act (59 Stat. 33, 15 U.S.C. §§ 1012(b) and 1013(b)) provide in pertinent part:

> "2(b). No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or impose a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided* that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the

extent that such business is not regulated by State law."

"3(b). Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Section 1 of Amendment 14 to the Constitution of the United States provides in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Travelers and Blue Cross of Western Pennsylvania ("Blue Cross") compete in the hospitalization insurance market in Western Pennsylvania. In the course of this competition, each offers coverage for hospital services at premiums which reflect the amounts which they must pay the hospitals for these services.

The hospitals of Western Pennsylvania charge for services performed for both inpatients and outpatients under a dual pricing structure. Patients who pay cash for services or are insured by commercial hospitalization carriers, such as Travelers, are billed by the hospitals according to a schedule of charges fixed by the board of directors of the hospital. If the insurance benefits have been assigned to the hospital by the patient, the insurance company pays the hospital directly. Patients who have Blue Cross coverage do not make direct payments to the hospitals, except for items not covered by their Blue Cross contract, but instead Blue Cross makes payments on their behalf to the hospitals at a special reduced rate. This special reduced rate ("the discount"), is on an average, 14% below the hospitals' regularly established charges for those services, and is a feature of the standard contract between Blue Cross and each of the hospitals of Western Pennsylvania. (Appendix B, pp. 12a-14a).

Because of this discrimination by the hospitals in favor of Blue Cross, it is virtually impossible for Travelers and other commercial insurance companies to compete with Blue Cross in the sale of hospitalization coverage in Western Pennsylvania.

Statement.

Travelers brings this action on the grounds that the standard contract is a contract in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, that the contract which provides for the Blue Cross discount has resulted in Blue Cross's obtaining a monopoly position in the market of providing hospitalization coverage in Western Pennsylvania, and that by soliciting the discount from the hospitals and using the discount as a competitive weapon, Blue Cross has engaged in monopolization and attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

Travelers seeks only injunctive relief under 15 U.S.C. § 26. It does not seek monetary damages.

The fundamental facts found by the District Court are as follows:

1. The relevant market in which the parties compete is the sale of hospitalization insurance in 29 counties of Western Pennsylvania.

2. "[T]he methods employed and the plan administered by Blue Cross . . . do result in a superior competitive position on the part of Blue Cross."*

3. "Blue Cross subscribers and their covered dependents number more than half of the entire population of the relevant market area." In the period 1965-1969, Blue Cross patients "were the recipients of 62% of all hospital days of service to Western Pennsylvania patients covered by hospitalization insurance." The re-

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*Quotations are from the opinion of the District Court, which is set forth in full in Appendix B.

maining 38% was divided among Travelers and approximately 300 other commercial carriers.

4. As to how Blue Cross acquired its "superior competitive position," the District Court found that the hospitals "charge policyholders of Travelers and other commercial carriers an average of 14% more for their services than they accept as full payment from Blue Cross." Blue Cross is therefore able to quote lower hospitalization insurance premiums than Travelers and the other commercial carriers, placing the commercial carriers at "a substantial price disadvantage" in their "quest for hospitalization insurance business."

5. In its advertising, Blue Cross features "the ability of its subscribers to acquire hospital services at rates lower than those charged by hospitals to other patients."

6. Though the hospitals receive less than charges for providing services to Blue Cross patients, they receive even *less* from Blue Cross if they fail to sign the standard contract—"those hospitals which do not enter the Blue Cross contract are paid [by Blue Cross] a per diem rate for their services to Blue Cross subscribers which is substantially less than their cost of service. Therefore, they sign the contract for their own economic advantage."

7. Finally, the District Court found that the hospitals were cornered into accepting the discount by "guidelines" transmitted by the Pennsylvania Insurance Department.

The District Court opinion thus describes a relevant market where competition is significantly nullified by

the overwhelming advantages of the dominant participant, Blue Cross. Blue Cross has 62% of the market, according to the measure adopted by the District Court, with the remaining portion fragmented among 300 commercial competitors. Further, Blue Cross has a 14% price advantage over its competitors. Nonetheless, the District Court held and the Court of Appeals affirmed that Blue Cross's competitors have no recourse under the Federal antitrust laws because the contract on which this litigation is predicated is subject to approval by the Pennsylvania insurance commissioner. Travelers disagrees and seeks review by this Court.

REASONS FOR GRANTING THE WRIT

The questions posed by this case are of vital interest to the whole of the United States and constitute important questions of Federal law which have not been, but should be, settled by this Court.

In the balance here is the question of whether private insurance carriers will remain in the field of hospitalization insurance in competition with Blue Cross plans in Western Pennsylvania and throughout the nation. If Blue Cross's competitive behavior is not limited by either the Federal antitrust laws or state regulation, and if it therefore may legally engage in monopolistic practices which exclude, restrict and prejudice competition by the commercial insurance carriers, then the many private insurance companies which have tried to offer hospitalization policies in competition with Blue Cross will have to leave the field, and Blue Cross will become the sole provider of private hospitalization insurance in the United States.

This case poses four important questions of Federal law which have never been decided by this Court, on the basis of which we urge this Court to exercise its discretion under Rule 19 to grant certiorari in this case.

Reasons for Granting the Writ.

(1) The McCarran Act

Since enactment of the McCarran Act in 1945, there have been only two opinions of this Court interpreting limited questions involving the exemption provided by the McCarran Act to the antitrust laws of the United States.* This Court has not heretofore had an occasion to define the breadth of the McCarran exemption. The decided cases leave unanswered the question of what kind and what extent of insurance regulation by a state is required to oust Federal jurisdiction over charges of restraint of trade, monopolization and attempts to monopolize. Nor are the limits clear for what the Court of Appeals has termed "garden variety antitrust violations," such as territorial restrictions, price-fixing, tie-in arrangements and the like. (Appendix A, p. 8a)

The holding of the courts below is that approval by the Pennsylvania insurance commissioner of the Blue Cross hospital contract and the general supervision of Blue Cross by the insurance commissioner under the Pennsylvania Nonprofit Hospital Plan Act** is sufficient to exempt Blue Cross and the Blue Cross hospital contract from scrutiny under the antitrust laws. The lower courts so held even though the state statute under which the insurance commissioner operates, the only

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*Federal Trade Commission v. National Casualty Co., 357 U.S. 560 (1958) and Federal Trade Commission v. Travelers Health Assn., 362 U.S. 293 (1960).

**The Nonprofit Hospital Plan Act, 40 P.S. §§ 1401-1409, originally enacted in 1937, was reenacted in 1972 as part of the Pennsylvania Consolidated Statutes as 40 Pa. St. §§6101-6127. The reenactment involved no statutory changes which are material to this case.

state statute applicable to Blue Cross, is entirely silent on the subject of contracts in restraint of trade, monopolization or attempts to monopolize. The lower courts so held notwithstanding also the fact that Pennsylvania statutes provide no procedure through which an injured competitor may seek relief.

If this is indeed the proper interpretation of the McCarran Act, then all insurance companies (including life, accident, casualty, health, etc.) are exempt from the Sherman Act prohibitions in any state in which there is a statute providing general regulation of insurance companies, even though the state statute is completely silent with respect to antitrust matters.

The McCarran Act, though it authorizes the states to tax and regulate the interstate business of insurance, provides that "the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. §1012(b). Though Pennsylvania has a statute which regulates Blue Cross and calls for Insurance Department approval of the standard contract here under examination, Pennsylvania has no statute which goes to the extent of regulating the competitive behavior of Blue Cross, about which Travelers complains. The question posed by the McCarran Act is not *whether* a state has regulated the business of insurance, but the *extent to which* the state has regulated that business. The District Court and the Court of Appeals have adopted the view, inconsistent with holdings in other circuits, that because Blue Cross is regulated by the Insurance Department for *some purposes,* it is immune from the application of the Sherman Act for *all* purposes. The Supreme Court has this present opportunity to clarify the

McCarran Act by defining the type and extent of state regulation required to produce immunity.

The cases in other circuits on point are clear and unanimous. When an antitrust charge is brought against an insurance company, the initial question for the court is whether the state has a statute regulating the anticompetitive conduct which is the subject matter of the charge. When the charge is that an insurance rating bureau is engaged in illegal price fixing, the question is whether the state has a statute which regulates the manner in which prices are fixed by the bureau. *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange,* 181 F. 2d 174 (8th Cir. 1950); *Allstate Ins. Co. v. Lanier,* 361 F. 2d 870 (4th Cir. 1966), *cert. denied,* 385 U.S. 930 (1966). When the charge is unfair advertising in violation of the Federal Trade Commission Act, the question is whether the state has a statute which regulates advertising in the manner of the FTC Act. *Federal Trade Commission v. National Casualty Co.,* 357 U.S. 560 (1958); *American Hospital & Life Ins. Co. v. Federal Trade Commission,* 234 F. 2d 179 (5th Cir. 1957); *Federal Trade Commission v. Travelers Health Assn.,* 362 U.S. 293 (1960). When the charge is illegal merger under Section 7 of the Clayton Act, the question is whether the state has a statute which regulates mergers of insurance companies. *United States v. Chicago Title & Trust Co.,* 242 F. Supp. 56 (N.D. Ill. 1965). When the charge is violation of the Sherman Act, the question is whether the state has a statute which prohibits insurance companies from engaging in conspiracy and monopolization *Professional and Business Men's Life Ins. Co. v. Bankers Life Co.,* 163 F. Supp. 274 (D. Mont. 1958); *Sanborn v. Palm,* 336

F. Supp. 222 (S. D. Tex. 1971). When the charge is conspiracy to exclude a particular insurance bidder, the question is whether the state has a statute which regulates competition in the bidding process. *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass. 1957), *aff'd*, 242 F. 2d 758 (1st Cir. 1957), *cert. denied* 355 U.S. 828 (1957).

Thus, with the charge in this case being that Blue Cross's market dominance, its substantial price advantage, and its use of that advantage against competitors constitute a violation of the Sherman Act, the question is whether Pennsylvania has a statute regulating the effects of the Blue Cross hospital contract and market dominance on competition. The answer to this question is clear—Pennsylvania has no such statute.

In light of the above cases, the District Court and the Court of Appeals were clearly in conflict with other circuits in concluding that *any* regulation by the state, whether or not it relates to competitive behavior, is sufficient to immunize an insurance entity from the Federal antitrust laws. To the contrary, the state regulation must be addressed to the competitive area covered by the applicable Federal antitrust law in order to produce immunity under the McCarran Act.

Furthermore, the mere fact that an entity is "subject to a high degree of governmental regulation" for other purposes does not exempt it from the Federal antitrust laws. *United States v. Philadelphia National Bank*, 374 U.S. 321, 368 (1963); *United States v. Borden Co.*, 308 U.S. 188, 196-202 (1939). Only if the regulating authority is specifically vested with the *duty* of regulating competitive behavior does its regulation supersede

the Federal antitrust laws. *United States v. Radio Corp. of America,* 358 U.S. 334, 339-46 (1959); *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966). In *Silver v. New York Stock Exchange,* 373 U.S. 341, 357-61 (1963), the Supreme Court held that the antitrust laws apply to the New York Stock Exchange, in spite of the fact that it is regulated by the Securities & Exchange Commission:

> "There is nothing built into the [SEC] regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." 373 U.S. at 358.

The Pennsylvania statute regulating Blue Cross does not pass this test. The trial court found that "the Pennsylvania Nonprofit Hospital Plan Act is completely silent in matters that have to do with restraint of trade." 298 F. Supp. at 1112. Because there is no Pennsylvania statute which "performs the antitrust function," Blue Cross is subject to the antitrust laws.

An additional reason why the Nonprofit Hospital Plan Act should not qualify under the McCarran Act to give Blue Cross immunity from the Federal antitrust laws is that it fails to provide a private right of action for injury suffered as a result of Blue Cross's anticompetitive activities. In order for a state regulatory statute to satisfy the requirements of the McCarran Act, it must give a private right of action to persons injured by the anticompetitive activities of an insurance company. *Zachman v. Erwin,* 186 F. Supp. 691, 694 (S.D. Tex. 1960); *Sears, Roebuck & Co. v. Allstate Life Ins.*

Co., 246 F. 2d 161, 172 (5th Cir. 1957); *Atlantic & Pacific Ins. Co. v. Combined Ins. Co.*, 312 F. 2d 513-515 (10th Cir. 1962).

(2) Sherman Act — Section 1

The significant question of Federal law involved here is what standard of "reasonableness" is to be applied when judging the validity of a contract in restraint of trade.

Heretofore the cases have looked at the reasonableness of the restraint of trade resulting from the contract in question in terms of whether it served some purpose which would itself further competition rather than limit it. *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918). The District Court and the Court of Appeals failed to look to the reasonableness of the restraint on competition but rather judged the contract to be reasonable because the hospitals had a good reason for entering into the Blue Cross contract and because a good social purpose was served by the contract, which benefited a substantial segment of the population. The lower courts misapplied the "rule of reason" by ignoring the effect of the contract on competition.

Since the earliest cases arising under the Sherman Act, the Supreme Court has given broad meaning to the condemnation of every restraining contract. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 312 (1897). Only if a restraint is reasonable can a contract be upheld. *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 60, 66 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5

(1958). The District Court correctly found facts that lead to the conclusion that the Blue Cross hospital contract unreasonably restrains trade. It found that "the evidence on the whole predominates in favor of Travelers that the methods employed . . . by Blue Cross resulted in a superior competitive position." (Appendix B, p. 22a) However, the District Court misconceived the purpose of the antitrust laws and, though it made no specific finding on the subject of the reasonableness of the contract, it concluded that the contract is not in violation of Section 1 of the Sherman Act because it was good for a sizeable group of people.

The District Court found that the contract's effect upon competition was "substantial" and "detrimental" to the ability of commercial carriers to compete effectively. (Appendix B, pp. 13a, 22a) Its findings describe a market where free competition is hampered by the unique capacity of one dominant competitor to obtain a special cost advantage. On the basis of these findings alone, one must conclude that the Blue Cross contract unreasonably restrains interstate commerce in violation of Section 1 of the Sherman Act.

The legal test of "reasonableness" was generally stated in *Board of Trade of the City of Chicago v. United States,* 246 U.S. 231, 238 (1918):

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

Though the District Court failed to apply this relevant legal test, it acknowledged that the contract does

not "merely regulate" or "promote competition"; it found that the contract has a suppressive effect upon competition. On the basis of the trial record, it could hardly have found otherwise. The Court of Appeals found that Blue Cross, in using its superior competitive position in negotiating with hospitals, was simply trying to get "the best deal possible" and on this basis found that the contract was reasonable. Neither the District Court nor the Court of Appeals considered reasonableness from the standpoint of the effect of the restraint on competition.

The competitive restraint resulting from Blue Cross's contractual discount takes at least three forms. First, Blue Cross is able to take over groups which had formerly obtained their hospitalization coverage from Travelers or another commercial carrier. For example, as of January 1, 1971, United States Steel Corporation changed the hospitalization coverage on a group of 24,000 salaried employees from a commercial carrier to Blue Cross because of the discount. This change resulted in a loss to the carrier of some $7 million in annual premiums. (120a, 174a-176a) A second form of restraint is that, in competitive bidding situations for new groups, Blue Cross is able to obtain the hospitalization insurance coverage due to its discount. (68a-69a, 109a-111a, 115a, 126a-127a, 135a-136a, 153a-154a, 175a-176a, 885a) Third, Travelers and other commercial insurance companies are often not even given the opportunity to bid on group hospitalization coverage because the group or its broker, knowing of the Blue Cross hospital discount and resulting price advantage, has simply considered it a waste of time to solicit bids from com-

mercial insurance companies. (61a-65a, 88a-90a, 96a-97a, 862a, 885a, 918a-919a; DX-251)

The result of the restraint is visible in the growth of Blue Cross. Blue Cross's sales of hospitalization insurance have greatly increased over the past twenty years. In 1950, Blue Cross had 1,606,848 participants; in 1960, it had 1,919,237 participants; and in 1970, it had 2,263,433 participants. (PX-1) In 1950, its annual premiums were $17,172,337; in 1960, its annual premiums had grown to $68,959,241; in 1970, its annual premiums were $170,780,270. In 1948, Blue Cross insured 31% of the population of Western Pennsylvania with hospitalization coverage; in 1970, it insured 51% of the population of Western Pennsylvania. (PX-5)

The growth of Blue Cross of Western Pennsylvania has surpassed the growth of Blue Cross plans in other parts of the country where the discount is either less than 14% or nonexistent. In 1970, all Blue Cross plans together insured 35% of the population of the United States, while Blue Cross of Western Pennsylvania insured 51% of the entire population of this area. (PX-1) The substantial Blue Cross discount is clearly a factor contributing to this growth.

The other side of this picture of Blue Cross's growth is the exclusion of Travelers and other commercial insurance companies from a substantial part of the market. Because of Blue Cross's greater discount in Western Pennsylvania, the sales offices of Travelers and other commercial carriers in the area do not have the success which they achieve in other parts of the country. (96a, 122a-123a) Though Travelers has been selling group hospitalization coverage since 1934 and

has been offering full service benefits since 1951, it has only an infinitesimal market share to show for these efforts. (PX-9) Its salesmen and those of other carriers are well enough able to sell other types of individual and group insurance coverage; it is only in the area of hospitalization insurance, where it must compete against the Blue Cross discount, that it has been substantially excluded. (49a, 109a-110a, 122a, 126a-127a) For the dominant competitor to exclude other competitors from their expectable market share through the use of a unique contractual price advantage, obtained due to its size and power, is clearly an illegal restraint. *International Salt Co., Inc. v. United States,* 322 U.S. 393, 394-96 (1947); *United States v. New York Great Atlantic & Pacific Tea Co.,* 173 F. 2d 79, 82 (7th Cir. 1949); *American Federation of Tobacco Growers, Inc. v. Neal,* 182 F. 2d 869, 873 (4th Cir. 1950).

There is no reasonable justification for the discount. In defending its discount, Blue Cross does not argue that its discount is "cost justified." The amount of the discount at any one hospital is not related to an amount which the hospital might save as a result of bulk billing or other administrative advantage. No one testifying on behalf of Blue Cross maintained that the 14% of the discount is ever related to identifiable savings which the hospital enjoys due to its relationship with Blue Cross.

Because the Blue Cross contract results directly in an unreasonable restraint of trade, the contract is in violation of Section 1 of the Sherman Act.

(3) Sherman Act — Section 2

The significant question of Federal law involved here is whether the monopoly power of Blue Cross, which the District Court found restricted competition from Travelers and other commercial carriers, is safe from attack under Section 2 of the Sherman Act because this monopoly position was "thrust upon" Blue Cross. The "thrust upon" defense to a charge of monopolization is a recognized defense, but the unique and significant feature here is that Blue Cross's position of monopoly power came about as a result of operating within the "guidelines" imposed by the Pennsylvania insurance commissioner. The insurance commissioner, so the District Court found, directed Blue Cross to pay only certain of each hospital's audited costs for Blue Cross patients, rather than the hospital's full costs or established charges. This leads to what the District Court found was a 14% discount in favor of Blue Cross, which in turn leads to a lower premium charge by Blue Cross, from which followed "public acceptance" and increased enrollment.

Heretofore the rulings of this Court have been that the "thrust upon" defense is that resulting from the "superior skill, foresight and industry" of the defendant, but here the "thrust upon" defense is based upon directives from the state insurance commissioner which result in a price discrimination by the hospitals between two classes of patients, i.e., Blue Cross patients and insurance company patients. If success is thus "thrust upon" Blue Cross by a directive of the insurance commissioner, does that give Blue Cross a defense to a charge of monopolization under Section 2 of the Sherman Act?

The salient economic fact found by the District Court is that Blue Cross is the dominant competitor. Blue Cross has a 62% share of the relevant market, it has a substantial competitive advantage over the other market participants in that it alone enjoys a 14% discount, and its 300 competitors divide the remaining 38% of the market, with none of them having a significant share of the market. (Appendix B, p. 13a)

From these facts, one must conclude that Blue Cross has monopoly power. It has successfully excluded meaningful competition. It uses its cost advantage to underbid its competitors and therefore it controls prices in the market. Its monopoly unreasonably restricts competition. *Cf. United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 380, 389-91 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964).

The size and power of Blue Cross affect its relationships with the hospitals and with its competitors. Blue Cross's size is inevitably a consideration leading the hospitals to sign the contract which provides for a discount. If Blue Cross covered only 5,000 people in Western Pennsylvania — rather than over 2,000,000, half the population — it is doubtful that any hospital would sign the approved contract giving Blue Cross a 14% discount.

Having obtained the discount due to its size, Blue Cross then uses the discount to grow larger. Blue Cross is able to bid lower premiums and to tell purchasers of its special hospital arrangement. (Appendix B, p. 13a) It thus intentionally uses the discount as a competitive weapon.

Furthermore, Blue Cross acts with the intent of driving its commercial competitors from the market. It argues that competition between commercial insurance companies and Blue Cross is "inappropriate," "unwise," "illogical,'' "wasteful," and "a destructive element." (PX-35, 39, 41) It maintains that the nation's whole health care delivery system will be "in jeopardy" if commercial carriers are permitted to remain in the market, and it tries to enlist the aid of civic groups and community leaders in its efforts to enroll the entire population of Western Pennsylvania. (PX-37, 38) If it were successful, it would stand completely without competitive challenge. Possessing monopoly power, and intentionally employing that monopoly power to exclude competitors in the relevant market, Blue Cross engages in monopolization and attempts to monopolize in violation of Section 2 of the Sherman Act.

Purchasers of group hospitalization coverage for large employment groups testified that Blue Cross's product and services are not superior, except for their lower price due to the discount. Such purchasers choose an insurance carrier strictly on the basis of price. In their view, the hospitalization coverage and services offered by Travelers and other commercial carriers are virtually identical to the products and services of Blue Cross. (94a-95a, 98a, 107a, 132a-133a, 139a, 142a, 147a, 152a-156a, 159a-160a, 172a, 888a, 947a) In attempting to secure the business of employment groups, Blue Cross uses its hospital discount as the central feature of its sales pitch. (PX-96, 154, 154b, 207, 207b, 208-210, 212)

Blue Cross is large and it is able to use its size to become larger. Its competitors, though many of them are sizeable, aggressive corporations, and are successful competitors in other markets — each have only a toehold in the hospitalization insurance market in Western

Pennsylvania. Because of its size, Blue Cross obtains a discount from the hospital. It then uses the discount as a competitive weapon, underbidding its commercial competitors. It thus controls prices and excludes competition — the classical behavior of a monopolizing competitor — in violation of Section 2 of the Sherman Act.*

(4) The Fourteenth Amendment

If it is the law that success due to a price discrimination "thrust upon" a defendant by a state agency is a defense to a charge of monopolization, then the issue is presented in this case whether such state-directed price discrimination is a denial of due process and equal protection of the laws under the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution forbids the states to deny "due process" and "equal protection of the laws." The District Court found that the Blue Cross discount results from features in the hospital contract which are required by the Pennsylvania Insurance Department. The Opinion of the Court of Appeals refers to "guidelines" issued by the Insurance Department. (Appendix A, p. 6a) These guidelines as described in the Opinion of the Court of Appeals, developed by the Insurance Department without any hearing or opportunity being given to Travelers to object, consisted of items of costs for which Blue Cross was not to reimburse the hospitals. The hospitals are then forced to turn to cash paying patients and commercial insurance patients in order to make up for the failure of Blue Cross to bear its fair share of the cost bur-

*In the very recent decision of Telex Corp. v. International Business Machines (A.T.R.R., Sept. 25, 1973, pp. A-1, D-1) the District Court once again held that the "thrust upon" defense must result from superior products or business acumen.

den. Thus, the guidelines discriminate in favor of Blue Cross and against its commercial competitors and deny to those competitors the "equal protection of the laws."

The Supreme Court has repeatedly held that a state's discriminatory grant of a competitive advantage to one competitor is a violation of the Fourteenth Amendment. *Mayflower Farms, Inc. v. Ten Eyck,* 297 U.S. 266 (1936); *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison,* 301 U.S. 459 (1937); *Morey v. Doud,* 354 U.S. 457 (1957).

There is no rational basis for the discrimination in favor of Blue Cross expressed through the Insurance Department "guidelines." The guidelines result in a system under which Blue Cross subscribers pay for hospital care on a discounted basis, while commercially insured and other cash paying patients are required to pay full charges for the same services. Blue Cross subscribers are freed from sharing in the burden of covering the hospitals' cost of providing care to indigent and defaulting patients and reserves for capital improvement, while commercially insured and cash paying patients pay charges which include a factor reflecting this burden. Due to the guidelines, hospitals are required to discriminate among their patients on the basis of whether they are Blue Cross subscribers or charge paying patients—a distinction for which there is no rational justification. Because the guidelines result in a denial of equal protection of the laws, without a rational basis for discrimination, and because the guidelines were developed without the holding of any bearing at which due process could be afforded to Travelers, the guidelines constitute state action in violation of the Fourteenth Amendment.

CONCLUSION

If this case involved steel, aluminum, milk, or electrical equipment, a violation of the Sherman Act would be clear and unchallenged. One competitor in the market has used a unique price advantage, obtained due to its size and power, to gain market dominance and to exclude meaningful competition. The question to be answered by this Court is whether the normal restraints on competitive behavior which are set forth in the antitrust laws are to be set aside simply because the defendant in this case is Blue Cross and the industry involved is the business of insurance. Health care and particularly hospital costs are major items of public concern, yet by the finding of the District Court, affirmed by the Court of Appeals, the private insurance carriers are clearly handicapped and under a distinct disadvantage in competing with Blue Cross. Whether this is sanctioned by the law is an important question of national concern which has not been, but should be, settled by this Court. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

(Filed July 10, 1973)

VAN DUSEN, Circuit Judge.

Travelers Insurance Company appeals from the January 6, 1972, district court order dismissing its complaint against Blue Cross of Western Pennsylvania, which order was entered after a trial to the court. Travelers had charged Blue Cross with restraining trade, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1970),[1] and with monopolizing and attempting to monopolize, in violation of section 2 of that Act.[2] To prevail, Travelers had also to establish that either Blue Cross' conduct did not come within the protective umbrella provided by the language of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, et seq. (1970),[3] or was excluded from the protection of that Act by the presence of boycott, coercion, or intimidation, see 15

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1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ."

3. § 1012(b) provides:

". . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

U.S.C. §1013(b) (1970).[4] After a lengthy non-jury trial, the district court concluded that Blue Cross' conduct was immunized by the McCarran-Ferguson Act and that, even absent such protection, the conduct did not violate the antitrust laws. See *Travelers Ins. Co. v. Blue Cross of Western Penna.*, — F. Supp. — (W.D. Pa. 1972) (1972 Trade Cas. ¶ 73,311, at 91,428).[5] We agree with the district court on both points.

The relevant market consists of 29 counties in Western Pennsylvania. Blue Cross provides hospitalization insurance for 51% of the population of this area; and during a relevant period Blue Cross accounted for 62% of all the patient days which were covered by commercial insurance.[6]

Travelers objects to a standard contract which Blue Cross has with 101 hospitals in this area which prescribes the amounts and terms under which Blue Cross pays for the services rendered its subscribers. Blue Cross reimburses hospitals only for audited costs subject to a ceiling;[7] and these costs do not include any

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4. "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or any act of boycott, coercion, or intimidation."

5. The findings in this opinion are not clearly erroneous. See F.R. Civ. P. 52. Earlier district court opinions in this case are *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 306 F. Supp. 219 (W.D. Pa. 1969), and *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 298 F. Supp. 1109 (W.D. Pa. 1969).

6. There were also patients who qualified for Medicare or Medicaid, etc., or who were not covered by any form of reimbursement for hospital or medical costs.

7. This ceiling varies for each of nine categories of hospitals.

portion of the general hospital expenses of capital construction, of providing free services to indigents, and of providing service to patients who default. Because of these limitations, Blue Cross pays some 14-15% less than the amounts that non-Blue Cross patients are charged.[8] Consequently, Blue Cross quotes rates for hospitalization insurance correspondingly lower than the rates of private insurance companies such as Travelers.

Whether the McCarran-Ferguson Act exempts Blue Cross' arrangement with these hospitals from antitrust scrutiny depends, first, on the scope of the statutory term "business of insurance," second, on the extent of state regulation of this arrangement, and third, on the presence or absence of boycott, coercion or intimidation.

The Supreme Court's most recent interpretation of the McCarran-Ferguson Act appears in *SEC v. National Securities, Inc.*, 393 U.S. 453, 457-61 (1969), where the Court held that a state insurance department's approval of a merger of insurance companies would not exempt the merger from the federal securities laws. The Court reasoned that regulation of the "business of insurance" meant control over the relationship between the insurance company and its policyholders; the term did not encompass regulation of the relationship between the

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8. The district court opinion makes clear that the volume of Blue Cross subscribers and its cooperative coverage of many poor risk subscribers (such subsidization amounted to $27,000,000. in the years 1960-1970; 700a-701a) are important factors in its ability to negotiate favorable contracts with the hospitals, subject to the approval of the State Insurance Department, see 40 P.S. § 1404.

company and its shareholders. However, although the Court fashioned this dichotomy, it did not fix the exact contours of the term "business of insurance." Rather, it indicated activities clearly covered — fixing rates, selling and advertising policies, licensing companies and agents, prescribing the types of permissible policies, etc — and suggested the possibility of additional ones, using this language:

> "Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class." 393 U.S. at 460.

Two district court cases which pre-dated *SEC v. National Securities, Inc.*, nevertheless are useful for com parison with the present case. In *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959), the "business of insurance" was held to include the size of commissions paid by companies to agents, because commissions were a vital factor in the companies' ratemaking structure. In contrast, the district court in *Hill v. National Auto Glass Co.*, 293 F. Supp. 295 (N.D. Cal. 1968), held that the McCarran-Ferguson Act would not protect Allstate, an automobile liability insurer, which allegedly secured installation jobs for selected automobile glass dealers. It can be surmised that the impact on Allstate's rates of the expense of replacing automobile glass, while it might be direct, would not be substantial.

In the present case, the district court found that the interrelationship of hospital payments and subscribers' rates was such that Blue Cross' arrangement with hospitals should be considered part of the "business of insur-

ance." This conclusion is a sound construction of the law and is amply supported by the evidence.[9]

Also, the evidence supports the district court finding that the state regulates the arrangement here in question. Section 4 of the Nonprofit Hospital Plan Act, Penn. Stat. Ann. tit. 40, § 1404, provides that:

> "The rates charged to subscribers by nonprofit corporations, . . . all rates of payments to hospitals made by such corporations pursuant to the contracts provided for in this act, . . .and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the Insurance Department."[10]

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9. One witness, Herbert S. Denenberg, the present Insurance Commissioner, testified as follows at App. 766a:

> "Q. Commissioner, in carrying out the responsibilities of your office as you see them, what relation, if any, have you found to exist between a Blue Cross plan reimbursement contract with its hospitals and the Blue Cross plan subscriber rates?
>
> "A. Well, these two things are really indivisible aspects reflecting the same economic forces. If you do not have a sound contract between Blue Cross and the hospitals that controls cost and quality then the Blue Cross rate to the subscriber is going to be unreasonable. So these are typically approached together.
>
> "Both at the hearings and in our adjudication we made it crystal clear that we think that these two items, the contract with the hospitals and the rates to the subscribers are part of the same package and we have to regulate both of them together or that we cannot provide health delivery to the public at the most reasonable cost possible."

10. We reject Travelers' argument that, to exempt conduct from the federal antitrust laws, state regulation

One recent case suggests that the mere existence of such a scheme of regulation, even if ineffective and unenforced, is sufficient to invoke the McCarran-Ferguson Act. *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). However that may be, the record here shows aggressive state regulation.[11] In fact, as the district court found, the features of the contract which Travelers finds objectionable were mandated by Insurance Department guidelines designed to encourage high quality care at reasonable cost. Auditing hospital costs and establishing a ceiling were thought to help hold down rising hospital costs by forcing administrative efficiency. Blue Cross was not to contribute to the care of indigents because this responsibility belonged to the state, not to the subscribers of Blue Cross. Finally, Blue Cross was not to support hospital construction for two reasons: such construction was usually financed by the state, the federal government, or private philanthropy; and, historically, hospitals serving the same area have needlessly duplicated expensive specialized services.

By its terms the McCarran-Ferguson Act does not protect "boycott, coercion, or intimidation." Travelers

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must parallel the Sherman Act. Had Congress desired this type of regulation, it could simply have continued the applicability to insurance companies of the Sherman Act itself. Moreover, that Congress intended to allow the states to regulate insurance on the basis of factors other than competition is conclusively demonstrated by the McCarran-Ferguson Act's immunization of rate-fixing.

11. See App. 761a-780a (testimony of Herbert S. Denenberg); App. 659a-684a (testimony of Francis R. Smith).

has not challenged the finding of the district court that Blue Cross at no time tried to influence the relationship between hospitals and other insurance companies. Instead, Travelers asserts that Blue Cross used "coercion" to extract concessions from the hospitals. The district court held, and we agree with its conclusion, that the economic inducements which made the Blue Cross contract acceptable to hospitals[12] did not amount to "coercion." Especially is that true where, as here, the hospitals negotiated jointly and the resulting contract was approved by the Insurance Department.

Even if the McCarran-Ferguson Act were inapplicable and Blue Cross was subject to antitrust scrutiny, we agree with the district court that Blue Cross could withstand such scrutiny. In arriving at this result, we have not reached the determination of whether Blue Cross possesses enough market power to have "monopoly power." Even assuming that such power exists, we have concluded that Blue Cross' arrangement with hospitals neither illegally restrains trade in violation of section 1 of the Sherman Act nor constitutes, in violation of section 2, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

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12. If a hospital refused to agree to the contract, Blue Cross would reimburse the hospital on a per diem basis by an amount insufficient to cover the hospital's costs. A hospital would have to make up any deficiency by charging the patient directly. We note that this procedure is typical of the indemnification plans offered by private insurance companies.

Our section 1 analysis begins with the recognition that the situation here does not involve a vertical restraint which has achieved garden variety status. That is, it is not a tie-in, an exclusive dealing arrangement, etc. Consequently, as the district court indicated, it must be carefully looked at on its own facts, in order to reveal whether any restraint of trade it causes is "reasonable." *See Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4-5 (1958); *cf. Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every rational enterprise does, i.e., get the best deal possible. This pressure encourages hospitals to keep their costs down; and, for its own competitive advantage, Blue Cross passes along the saving thus realized to consumers. To be sure, Blue Cross' initiative makes life harder for commercial competitors such as Travelers. The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned. It must be pointed out that the size of its competitors does not give Blue Cross the freedom to conduct other than fair competition for business. The dependence of the community on health facilities requires that anti-competitive practices not be tolerated.

We note that one case, *United States v. New York Great A. & P. Tea Co.,* 173 F.2d 79 (7th Cir. 1949), seems to hold that it violates the Sherman Act for a seller to force suppliers to lower their prices to him. The *A. & P.* case, though, is distinguishable both as to the practices involved and as to the business context of these practices. In addition to its aggressive bargaining over price, A. & P. was also found to exert pressure on

suppliers either not to deal or to alter their dealings with A. & P.'s competitors. No comparable conduct was shown here. In fact, the evidence does not support the proposition that Travelers or other companies could not have achieved some price reductions.[13] Moreover, A. & P. was found to have engaged on several occasions in predatory pricing—selling at retail below its wholesale cost in order to drive competing retailers out of business. This predatory conduct would have been particularly serious due to the small size of many independent grocers: once forced out of business they would be unable to re-enter the market. Here, in contrast, there was no evidence of predatory pricing. Furthermore, there is no reason to suppose that, even if commercial insurers such as Travelers were currently unable to compete with Blue Cross, they could not immediately re-enter the hospitalization insurance business if it became profitable to do so.

In regard to the Sherman Act §2 question, we agree with the district court's determination that Blue Cross achieved its present status in a permissible manner. It was first suggested in *United States v. Aluminum Co. of America,* 148 F.2d 416, 429-30 (2d Cir. 1945), that a monopoly may be "thrust upon" a producer "merely

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13. In its brief at 14, Travelers calls our attention to the testimony of various of its witnesses at App. 862a-863a; 890a-891a; 936a-937a; 944a. However, almost all of this evidence suggests not that Travelers was unable to obtain any price reduction from hospitals, but rather that Travelers assumed its inability to do so and, therefore, did not press the matter, Moreover, it is not clear that Travelers was willing to adopt a full-cost reimbursement scheme comparable to that of Blue Cross (as opposed to the typical indemnification arrangement) as a quid pro quo.

by virtue of his superior skill, foresight and industry," and that such a result would not be violative of section 2.[14] In *United States v. Grinnell Corp.*, quoted above, the Supreme Court reaffirmed this position. The district court found, on ample evidence, that Blue Cross owes its success to the completeness of its coverage. From the time of its organization in the late 1930s, Blue Cross has reimbursed hospitals for all covered services rendered its subscribers. Private companies, on the other hand, have, until relatively recently, provided only that their policyholders would be indemnified up to a set dollar ceiling.[15] Blue Cross thus has exposed itself to considerably greater risk because of the possibility that treatment would be extensive and because of the probability that hospital costs would rise. By shouldering the risk, Blue Cross has made itself considerably more attractive to consumers. The antitrust laws were not intended to condemn such conduct.

One final contention of Travelers may be disposed of quickly. Travelers now argues that if Pennsylvania grants a competitive advantage to Blue Cross via the operation of the McCarran-Ferguson Act, Pennsylvania denies Travelers equal protection of the laws. Travelers concedes that it did not present this argument to the district court until, after the lengthy trial, Travelers submitted a list of requested findings of fact and con-

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14. If this would be true for a monopolist, it would apply even more strongly to the present situation in which Blue Cross clearly does not have a monopoly.

15. The commercial companies are now willing to write complete coverage for at least large-group plans. It appears that Blue Cross is still alone in offering this arrangement to small groups and to high-risk individuals.

clusions of law. It is questionable whether such belated presentation properly raised the issue before the district court so as to make consideration here proper. *See Andrews v. Chemical Carriers, Inc.*, 457 F.2d 636 (3d Cir. 1972). In any event, the argument has little merit. In view of our holding that, independent of the McCarran-Ferguson Act, the antitrust laws were not violated, the state of Pennsylvania has not denied Travelers equal treatment in violation of the Fourteenth Amendment. Furthermore, even if McCarran-Ferguson Act protection were necessary to Blue Cross, the facts do not support the proposition that Pennsylvania's regulation of the contract between Blue Cross and the hospitals was without rational purpose, *see, e.g. James v. Strange*, 407 U.S. 128 (1972).

The judgment of the District court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

Final Opinion of the United States District Court for the Western District of Pennsylvania

(Filed January 6, 1972.)

The Travelers Insurance Company (Travelers), a corporation engaged in the business of general or "all lines of" insurance for profit, invoking Sections 1 and 2 of the Sherman Anti-Trust Act*, seeks relief from the effects of certain practices on the part of Blue Cross of Western Pennsylvania (Blue Cross), a non-profit corporation engaged exclusively in that phase of the insurance business which deals with the guaranteeing of payment for hospital care. It is stipulated that the business of both Travelers and Blue Cross affects interstate commerce and that this court has jurisdiction over the parties and the subject matter.

The record, which includes the transcript of a comprehensive non-jury trial held before the undersigned, reveals that Blue Cross subscribers and their covered dependents number more than half the population of the relevant market area—namely, twenty-nine counties in Western Pennsylvania—and that during the period 1965-1969, they were the recipients of 62% of all hos-

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*1. 15 U. S. C. A. Sec. 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or wit foreign nations, is declared to be illegal. . . ."

2. 15 U. S. C. A. Sec. 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor. . . ."

pital days of service to Western Pennsylvania patients covered by hospitalization insurance. Hospitals accept from Blue Cross in full payment for their services to Blue Cross subscribers their audited costs of service to Blue Cross subscribers as a unit, under the terms of a standard form of contract between Blue Cross and 101 hospitals in and about the relevant market area. In order to cover their fundamental requirements not incurred by reason of services to Blue Cross subscribers —such as the cost of services to indigent and defaulting patients—the same hospitals charge policyholders of Travelers and other commercial carriers an average of 14% more for their services than they accept as full payment from Blue Cross. Travelers' "cost of claims", therefore, for the same hospital services is 14% higher than that of Blue Cross. Inasmuch as the cost of claims of both Travelers and Blue Cross accounts for 90% or more of their income from subscribers or policy-holders, as the case may be, the 14% differential subjects Travelers to a substantial price disadvantage in its quest for hospitalization insurance business. It is also to be noted that Blue Cross' promotional activities, prior to the filing of the instant action, featured the ability of its subscribers to acquire hospital services at rates lower than those charged by hospitals to their other patients and, further, that those hospitals which do not enter into the Blue Cross contracts are paid a per diem rate for their services to Blue Cross subscribers which is substantially less than their costs of service. Hence, Travelers presents Blue Cross as a dominant competitor monopolizing hospital insurance coverage by inducing the providers of hospital service into a discriminatory arrangement in favor of Blue Cross subscribers and

against the commercial insurance carrier's policyholders.

On the other hand, the activities of Blue Cross in all respects material to this case, including the terms of the contract under attack, are regulated and directed by the Insurance Department of the Commonwealth of Pennsylvania in strict conformity with the provisions of the Non-profit Hospital Plan Act of 1937, 40 P.S. § 1401 *et seq.*, enacted by the Pennsylvania General Assembly to meet a public health problem described in "The Middle Road", a study report of the Pennsylvania Economy League, as follows:

> "In the early 1930's, when the United States experienced one of its worst economic depressions, hospital financing in Western Pennsylvania, as in the country in general, was in difficulty. Voluntary hospitals were under-financed, and it was common for people to forego needed hospitalization because they lacked money to pay the bills. Forced economies resulted in the discontinuance of some hospital services and retarded development in other services.
>
> * * *
>
> As a result, the community of Western Pennsylvania as a whole was not receiving adequate hospital care even by the standards of those days."

In the words of The Honorable Herbert B. Cohen, Majority Leader of the Pennsylvania House of Representatives, and sponsor of the aforesaid Act:

> "5. The Legislature of Pennsylvania in approving this law was attempting to meet a severe need of providing citizens of Pennsylvania with Hospital

care at a cost within their means and also of providing hospitals with a source of financial support which would place them in a more stable financial position and thereby less dependent upon state and local tax funds. The Legislature therefore was attempting to fill a gap created by commercial insurance companies' underwriting policies which left the mass of Pennsylvania citizens unprotected from hospitalization expenses and hospital bills in many instances unpaid. It proceeded to close this gap by authorizing the creation of non-profit hospital plans, now known as Blue Cross plans, which through contracts with hospitals would provide hospital services for subscribers and guarantee the payment of their hospital care."

Under the terms of the said Act, Blue Cross, having been previously organized under the Pennsylvania Nonprofit Corporation Law, approved May 5, 1933, P. L. 289, for the purpose of establishing, maintaining and operating such a non-profit hospital plan became subject to regulation by the Pennsylvania Insurance Department in the following respects: "the rates charged to subscribers . . ., all rates of payments to hospitals . . ., all acquisition costs in connection with the solicitation of subscribers . . ., the reserves to be maintained . . ., the certificates issued representing subscribers' agreements, and any and all contracts entered into with any hospital." (In the same Act, Blue Cross was extended an exemption from taxation and from "all other of the insurance laws of this Commonwealth.") The Blue Cross hospital contract is, therefore, an integral part of Pennsylvania's regulated hospital plan. By reason of the interrelationship of hospital payments and Blue Cross

subscriber rates the contract also falls within the ambit of "insurance business". As stated in *Securities and Exchange Commission v. National Securities, Inc., et al.*, 393 U.S. 453 (1969):

> "The relationship between insurer and insured, the type of policy, which could be issued, its reliability, interpretation, and enforcement—these were the core the 'business of insurance'. . . . Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance'."

Blue Cross accordingly asserts two defenses—(1) an exemption under the McCarran-Ferguson Insurance Regulation Act and (2) a general denial of any acts which constitute monopolization or restraint of trade within the meaning of the Sherman Act.*

Section 2(b) of the McCarran-Ferguson Insurance Regulation Act, 15 U. S. C. A. § 1012, provides:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ..."

Since all Blue Cross activities of which Travelers complains occur within the area of state-regulated insurance business, it would appear that, without more, the

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*On Motion for Summary Judgment it has been previously determined that Blue Cross' participation in the Pennsylvania Nonprofit Hospital Plan does not extend to it the Sherman Act exemption generally applied to the governmental actions of a state. *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 298 F. Supp. 1109 (W.D. Pa. 1969).

McCarran exemption should apply. Section 3(b) of the said Act, however, reads as follows:

> "Nothing contained in this chapter shall render . . . the said Sherman Act inapplicable to any . . . act of boycott, coercion, or intimidation."

It was only Travelers' allegations to the effect that the Blue Cross hospital contract was obtained through "boycott, coercion and intimidation", then, which enabled its claim to survive a motion for summary judgment on McCarran-Ferguson grounds. See *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 306 F. Supp. 219 (W.D. Pa. 1969). Travelers, consequently, bears the burden of establishing both an unreasonable restraint of trade under its Sherman Act claim and the accomplishment thereof through "boycott, coercion and intimidation", lest its claim fall under McCarran.

As indicated above, Travelers has localized the source of Blue Cross' dominant competitive position in the discriminatory price advantage emanating from Blue Cross' contracts with hospitals. Its target is the heart of the Blue Cross plan—the hospital contract. The contract itself then, as well as the setting in which it originated, must be tested for unreasonable-restraint-of-trade characteristics and elements of boycott, coercion and intimidation.

The contract in issue, approved by the Pennsylvania Insurance Department on January 11, 1967, was the outgrowth of a constant flow of communication between representatives of the Hospital Council of Western Pennsylvania and the Northwest Association of which the various contracting hospitals are members, on the one hand, and representatives of Blue Cross on the

other. In this forum hospitals were recognized as a community health service, Blue Cross as a community organization through which the members of the public who chose to do so might pre-pay in periodic installments the costs of their hospital care, and the Blue Cross formula of reimbursement to hospitals as a community-wide problem. This forum also had the benefit of the experience of both hospitals and Blue Cross through a series of previous contracts commencing early in the year 1938. The first contract which became effective early in 1938 provided for a flat *per diem* reimbursement which was the same for all hospitals. In January, 1951, a second contract was entered into which provided for hospital payment based upon the audited costs of hospitals. The third contract containing certain refinements of the hospital reimbursement formula based upon audited costs was entered into in 1956. The latter contract remained in effect until the current 1966 contract was approved by the Insurance Commissioner on January 11, 1967. Before any of the contracts mentioned were finalized their terms were thoroughly considered by the Pennsylvania Insurance Department which also conducted exhaustive public hearings on the subject matter. It should also be noted that each revision of the contract and the day-to-day experience of the parties in complying with its terms required occasional requests by Blue Cross for approval by the Pennsylvania Insurance Department of subscriber rate adjustments, some of which were granted, some of which were granted in part only, and some of which were denied *in toto*. In the course of their negotiations it was made abundantly clear to both the hospitals and Blue Cross that in their participation in the Pennsylvania

Nonprofit Hospital Plan certain matters of policy would be inflexible, namely—(1) that hospital reimbursement formulae be based on costs and limited by a ceiling, (2) that the hospital cost of free care be excluded in the application of any reimbursement formula and (3) that the cost of new hospital construction or amounts attributable to capital expansion be excluded from any cost-based reimbursement formula. Within these guidelines numerous proposals were extensively discussed between representatives of the above-mentioned hospital associations and representatives of Blue Cross, as a result of which the parties arrived at a hospital-sponsored amendment to the existing reimbursement formula designed to accommodate the specific financial needs of each of the contracting hospitals according to its own classification within any one of nine categories.* An appeal procedure for those hospitals which might consider themselves aggrieved with respect to reimbursement for service to Blue Cross subscribers was agreed upon and the contract in other respects, as well, reflects the fact that, although the conferees were not in unani-

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*Statement of Herman M. Sommers, Ph. D., one of defendant's expert witnesses:

> "(2) . . . hospitals are grouped into nine categories, based on combinations of geographic location and teaching responsibilities of the hospital. The ceiling for an individual hospital is ten per cent above the weighted average of the *per diem* costs of hospitals within its own group—weighted by the number of patient days at the various institutions in the particular hospital grouping.
>
> * * *
>
> (6) The contract provides for payment of an additional three percent of the hospital's audited cost in lieu of building depreciation."

mous accord on all its provisions, the current Blue Cross contract is the result of exhaustive negotiation carried on with due regard for the mutual needs and responsibilities of the hospitals and Blue Cross as community service institutions participating in the Commonwealth of Pennsylvania's plan for the efficient maintenance of an essential community health service at the lowest possible cost to the public. On this point the testimony of Walter Rome, Administrator of Children's Hospital, Pittsburgh, Pennsylvania, is typical of the attitude of the hospitals toward the existing contract with Blue Cross:

> "I have been in the hospital field, as I said a moment ago, for twenty some years. I can never remember a time in that entire period when hospital administrators either officially or unofficially or formally or informally were not having conversations regarding the last contract with Blue Cross and whether or not the time was ripe to consider new items that might be introduced as part of a new contract.

---

*Statement of Herman M. Somers, Ph.D., one of defendant's expert witnesses:

> "(2) . . . hospitals are grouped into nine categories, based on combinations of geographic location and teaching responsibilities of the hospital. The ceiling for an individual hospital is ten per cent above the weighted average of the *per diem* costs of hospitals within its own group—weighted by the number of patient days at the various institutions in the particular hospital grouping.
>
> (6) The contract provides for payment of an additional three percent of the hospital's audited cost in lieu of building depreciation."

You must understand that for the most part inasmuch as hospitals created Blue Cross in the first place, that we look on Blue Cross as the partnership of the hospitals. . ." Tr. 1143-1144.

". . . I remember I was delighted with this contract, because it resulted in something I had been trying to obtain for a long time, and it was my feeling that this was a contract that both the Blue Cross and the hospital could live with and it was in the best interests of the community and of the hospitals and of Blue Cross. . . ." Tr. 1166.

It is apparent that the overriding motive of both contracting parties was the performance, within the outline of Pennsylvania Insurance Department Regulations, of their role in the implementation of a community health service plan on a non-profit basis—a manifestly legitimate purpose pursued in an atmosphere free of coercive tactics on either side. It is also evident that hospitals voluntarily accept the Blue Cross plan for their own economic advantage. The following testimony of Dr. Herman M. Somers is indicative:

"Yes, the contract it seems to have many benefits for hospitals and a considerable balance of benefits over disadvantages. The chief one is the guarantee of payment which was at least one time extremely significant to hospitals, unpaid bills represent a very major chunk of their costs.

They are guaranteed that they will be paid and they are guaranteed that they will be paid costs and since they are, by and large, non-profit institutions costs is all one can reasonably expect and while costs, of course, are not easy to define, and

always subject to disputation and always will be, nonetheless, it is on the basis if costs by a definition that is now generally accepted and very widely used.

And they have the advantage of prompt payment, it is very important financially, I said, and Blue Cross pays currently or concurrently, they often say, with the actual incidence of the costs to the hospital, a matter which is financially advantageous. . ." Tr. 3300.

In this connection, it must also be added that the record pertaining to Blue Cross' contract with hospitals contains no direct evidence of coercion on the part of Blue Cross, or coerced reaction on the part of any hospital, or of any discussion or arrangement between Blue Cross and any hospital which directly or indirectly touches upon the relationship of any hospital with Travelers or other commercial insurance carriers.

The evidence on the whole preponderates in favor of Travelers to the effect that the methods employed and the plan administered by Blue Cross, when compared with the hospitalization insurance product of Travelers and 300 other commercial carriers, do result in a superior competitive position on the part of Blue Cross of Western Pennsylvania in the relevant market area and in the relevant product market—hospitalization insurance coverage, whether on a group basis or an individual basis. But Travelers has not met its burden with respect to the issues of monopolization or restraint of trade through boycott, coercion or intimidation. As stated before, the evidence discloses no activity or agreement having to do with the relationship of hospitals and Travelers, much less any inducement to the

hospitals not to deal with Travelers. The evidence likewise negates the presence of coercion or intimidation on the part of Blue Cross, and Travelers' theory of "inherent coercion" predicated upon the proposition that the hospitals had "no alternative" because of "community pressure" does no more than lend credence to Blue Cross' "thrust upon" defense, which is grounded on the existence of historic accident, superior product, and business acumen as the reasons for its superior competitive position. Community attraction and economic appeal are the antithesis of coercion and intimidation.

Recapitulating, this court has concluded that Blue Cross' competitive status was not acquired by boycott, coercion or intimidation; that whatever share of the hospitalization insurance market Blue Cross enjoys is the result of public acceptance uninfluenced by any artificial restraint-of-trade practices on its part; that Blue Cross is not a monopolist, for it not only lacks control over the rate-making effects normally incident to lawful competition, but is without power to establish its own rates; that Blue Cross, therefore, has not violated the provisions of the Sherman Antitrust Act; and that, in any event, Blue Cross is entitled to the McCarran-Ferguson Act exemption.

Not unmindful of the following alert set forth in 54 Am Jur 2d, *Monopolies, etc.*, § 3, it is deemed appropriate, nevertheless, to enumerate the statements of principle not previously stated which led to these conclusions:

> "Legal researchers should be wary of general language in Sherman Act cases. Each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and the

opinions in the cases must be read in the light of their facts."

54 Am Jur 2d, *supra*, citing *Maple Flooring Mfrs. Assn. v. United States*, 268 U. S. 563 (1925).

The thrust of the Sherman Antitrust Act is the prevention of restraint-of-trade and monopolistic practices which, by unwarranted interference with free competition among the suppliers of products or services, have a tendency to deprive the public of the benefits ordinarily derived from the rivalry of a number of sellers. *United States v. Von's Grocery Co.*, 384 U. S. 270, 275 (1966); *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956); *American Medical Assn. v. United States*, 317 U. S. 519 (1943).

"The purpose of preventing undue restraint of trade is to prevent unreasonably high prices to the purchasers and users of the articles traded in." *United States v. Int. Harvester Co.*, 274 U. S. 693, 701 (1927).

"In applying remedies for this purpose, however, the fact must not be overlooked that *injury to the public* by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute (Sherman Act) rest. . . ." [Emphasis and parenthesis added]. *Standard Oil Co. v. United States, supra*, p. 78.

Although the possession of a large portion of the relevant market may be a factor in determining the existence of a monopoly, bigness alone does not constitute proscribed monopoly power, and where activities are predominantly motivated by legitimate business aims or where monopoly power is acquired through nor-

mal growth and development, as a consequence of having a superior product or business acumen, or through historical accident, the Sherman Act is not offended. *Kansas City Star Co. v. United States,* 240 F. 2d 643, 658 (8 Cir.), cert. denied, 354 U. S. 923 (1957); *Times-Picayune Pub. Co. v. United States,* 345 U. S. 594 (1953); *United States v. Aluminum Co. of America,* 148 F. 2d 416 (2 Cir. 1945).

> "A business organization which has acquired monopoly power is guilty of monopolization if it undertakes a course of action the consequences of which would be to exclude competitors or prevent competition. Proof of a specific intent is not necessary [as it is under 'attempt to monopolize'] . . .
>
> However it cannot be required to forego normal competitive business methods to further legitimate business ends, as distinguished from acts which are done with the intent to create or preserve a monopoly, or which would have the consequence of excluding competitors from a relevant market." *American Football League v. National Football League,* 305 F. Supp. 60, 64 (D. Md. 1962), aff'd. 323 F. 2d 124 (4 Cir. 1963).

Congress in the passage of regulatory statutes such as the Interstate Commerce Act, etc., including the extension of regulatory authority to the states as under the McCarran Act, recognized the fact that the salutary effects of competition may be accomplished by regulation as well.

> "Strict regulation and supervision, particularly with respect to rates charged the public — [is] an effective safeguard against the evils attending mo-

nopoly at which the Sherman Act is directed." *McLean Trucking Co. v. United States,* 321 U. S. 67, 85 (1944).

On the applicability of the McCarran Act, see *Ohio AFL-CIO, et al. v. Insurance Rating Board, et al.,* —— F. 2d —— (6 Cir. Opinion filed Nov. 30, 1971).

Finally, it must be kept in mind that, under all the evidence in this case, the only available judicial remedy for Travelers' plight, the enjoining of Blue Cross activities, would necessarily produce a result inconsistent with the basic and ultimate goal of the federal antitrust laws—consumer protection. The seller's protection is apposite only to the extent that it is not inconsistent with the public's attainment of the highest quality products and services at the lowest possible price.

The previous finding that all challenged Blue Cross activities were conducted in conformity with the Pennsylvania Nonprofit Hospital Plan Act, *supra,* disposes of Travelers' claim based upon alleged violations of the said Act and submitted on the theory of pendent jurisdiction. As to plaintiff's further pendent claim that defendant's alleged acts of boycott, coercion and intimidation violate the Pennsylvania Unfair Insurance Practices Act, 40 P. S. §§ 1151 *et seq.,* the same reasoning applied above in treating plaintiff's identical Sherman Act allegations is dispositive.

An appropriate Order will be entered.

HERBERT P. SORG, *D.J.*

Dated: January 6, 1972.

APPENDIX C

Opinion of the United States District Court for the Western District of Pennsylvania Denying Defendant's First Motion for Summary Judgment

(Filed Jan. 16, 1969)

SORG, District Judge

[1] This Motion for Summary Judgment presents a single issue. Do the activities and transactions of Blue Cross of Western Pennsylvania, a corporation, (hereinafter called "Blue Cross"), constitute state action as opposed to private action so as to exclude them from the proscription by federal law of restraint upon trade or monopolization? As stated in Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight, Inc., et al., 365 U.S. 127, pp. 135-136, 81 S.Ct. 523, p. 528, 5 L.Ed.2d 464:

> "It has been recognized, at least since the landmark decision of this Court in Standard Oil Co. v. United States, 221 U.S. 1, at 51-62, 31 S.Ct. 502, 55 L.Ed. 619, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations'. Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. (United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315). These decisions rest upon the fact that under our form of government the question whether a law of that kind should

pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution."

The plaintiff, Travelers Insurance Company, (hereinafter called "Travelers"), has filed a complaint against Blue Cross seeking relief from its alleged unreasonable restraint of competition among Blue Cross, Travelers, and other health insurance carriers, in violation of Section 1[1] of the Sherman Act, and the alleged attempt by Blue Cross to monopolize the business of providing hospitalization coverage in violation of Section 2[2] of the Sherman Act. It is conceded that the effects of the acts complained of on interstate commerce and the nature of the acts, whether unreasonably restraining competition or monopolistic vel non, are not brought into issue by Blue Cross' Motion for Summary Judgment. Nor does Blue Cross claim exemption as an insurance business under the McCarren Act.[3] It bases it Motion for Summary Judgment exclusively on

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1. 15 U.S.C.A. Sec. 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

2. 15 U.S.C.A. Sec. 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

3. 15 U.S.C.A. Sec. 1012(b): "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *."

the theory that its acts constitute valid governmental action by the Commonwealth of Pennsylvania.

Under the terms of the Pennsylvania Non-Profit Hospital Plan Act, 1937, June 21, P.L.1948, Blue Cross, having been previously organized under the Pennsylvania Non-Profit Corporation Law approved May 5, 1933, P.L. 289, for the purpose of establishing, maintaining and operating a non-profit hospital plan became subject to regulation by the Pennsylvania Insurance Department in the following respects: the rates charged to its subscribers; all rates of payments to hospitals; all its acquisition costs in connection with the solicitation of subscribers; the reserves it must maintain; the certificates it may issue representing subscribers' agreements; and any and all contracts it may enter into with any hospital. Any action by Blue Cross in the aforesaid respects without the prior approval of the Insurance Department was and is unlawful, although an appeal to the Court of Common Pleas of Dauphin County from the Insurance Department's refusal of an application for approval is provided for by the Hospital Plan Act. Blue Cross was and is also required to file annual statements with the Insurance Department, and its books and records are subject to examination by that Department. Its dissolution or liquidation is subject both to prior approval by the Insurance Department and to supervision by the Insurance Commissioner. It is also extended an exemption from taxation by the Commonwealth of Pennsylvania and its political subdivisions.

Blue Cross does not dispute that it is a private entity within the scope of the Sherman Act, but contends that, because each and every one of the acts of which plaintiff complains falls within the categories enum-

erated above, and because they were not only approved but directed by the Insurance Department, such acts are the responsibility of the Commonwealth of Pennsylvania and are, therefore, beyond the reach of the Sherman Act. (The transactions complained of consist, in general, of contracts with various hospitals, containing preferential payment schedules, etc., allegedly acquired by Blue Cross as a result of its dominant position in the field of hospital payment plans.)

The gist of Travelers' contentions is that the activities of Blue Cross cannot constitute state action unless the state extends to it an identity within the framework of state government — that if it is to share governmental immunity it must be, in effect, established by the government for a particular governmental purpose; that the state action to be exempted must be specifically authorized by statute; and that the state does not endow a private entity with a governmental attribute by mere regulation or supervision in the public interest.

[2] An analysis of the cases cited by both parties reveals that where a "state action" exclusion from the scope of the Sherman Act has been sanctioned by the courts, a particular pattern emerges from the statute under which such action is taken. Not only does the legislature create the entity involved or endow it with governmental character, but it also directs and authorizes that entity by means of the same statute to utilize anticompetitive means to achieve a specific governmental purpose. For example, in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the California legislature not only created prorate raisin districts but authorized them to limit production artificially in order to correct adverse market conditions.

Such behavior, if manifested without government direction, would be contrary to federal antitrust legislation. Similarly, in Allstate Insurance Co. v. Lanier, D. C., 242 F.Supp. 73, 361 F.2d 870 (4 Cir. 1966), a case upon which defendant relies heavily as authority for its motion, the statute not only created the North Carolina Automobile Rate Administrative Office and provided for its regulation by the state insurance commissioner but also expressly authorized price-fixing, an activity proscribed under antitrust laws, in order to protect the people of North Carolina from excessive premiums. In E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1 Cir. 1966), the Massachusetts legislature not only created the Massachusetts Port Authority but also endowed it with certain sovereign powers (such as eminent domain) and enabled the Authority to operate the Boston airport as a monopoly. On the other hand, no case cited by the parties nor discoverable through extensive research reveals any authority ascribing "state action" immunity either to a private entity or to the transactions of a state agency which were not mandated or directed by legislative enactment. That regulation and supervision alone do not constitute a delegation of governmental authority is well established. United States v. Utah Pharmaceutical Association, D.C., 201 F. Supp. 29 (1962); California v. Federal Power Commission, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). Further, the Pennsylvania Non-profit Hospital Plan Act is completely silent in matters that have to do with restraint of trade. It is, therefore, deemed appropriate to apply the test suggested in Parker v. Brown, 317 U.S. 341, at p. 352, 63 S.Ct. 307, at p. 314, 87 L.Ed. 315, as follows:

> "* * * It is the state which has created the machinery for establishing the prorate program. * * * The state itself exercises its *legislative authority* in making the regulation and in prescribing the conditions of its application. * * *" [Emphasis Added]

[3] Blue Cross fails to meet the apparent standards inherent in a "state action" exclusion from the scope of the Sherman Act in two respects. It is the creature of individuals — not the state — and it has not been extended valid governmental authority to engage in monopolistic practices.

Although Travelers has indicated a factual dispute concerning Blue Cross' assertion that the insurance commissioner directed or approved all the activities about which Travelers complains, this issue is deemed immaterial, and the Motion for Summary Judgment will be denied on the basis of those facts that are not in dispute.

An appropriate order will be entered.

APPENDIX D

Opinion of the United States District Court for the Western District of Pennsylvania Denying Defendant's Second Motion for Summary Judgment

(Filed November 10, 1969)

SORG, District Judge.

It having been determined on defendant Blue Cross' previous Motion for Summary Judgment that it is not immune as a state agency from the provisions of the Federal Anti-Trust Laws, Blue Cross has filed a second Motion for Summary Judgment claiming the exemption extended by the McCarran Act, infra, to those engaged in the business of insurance.

Blue Cross does compete with other insurance carriers in the field of hospitalization coverage and its practices in all respects concerning which plaintiff Travelers complains are regulated by the Insurance Commissioner of Pennsylvania, as is more fully set forth in this court's memorandum filed on January 16, 1969, in connection with defendant's first Motion for Summary Judgment, D.C., 298 F.Supp. 1109. Travelers asserts, however, that the practices complained of, whether regulated and approved by the Pennsylvania Insurance Commissioner or not, are specifically excepted from the McCarran Act exemption in that they affect competition through "boycott, coercion and intimidation."

Section 2(b) of the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C.A. § 1012, provides: "No Act of Congress shall be construed to invalidate, impair, or

supersede any law enacted by any State for the purpose of regulating the business of insurance, * * *." Section 3(b) of the same Act, 15 U.S.C.A. § 1013, however, declares: "Nothing contained in this chapter shall render * * * the said Sherman Act inapplicable to any * * * act of boycott, coercion, or intimidation."

[1, 2] Travelers alleges that Blue Cross, exercising the competitive advantage of one writing over seventy percent of the hospitalization coverage in Western Pennsylvania, exacts from reluctant hospitals an agreement to accept payment for hospital services to its subscribers in amounts less than the charges made to non-subscribers of Blue Cross. Travelers alleges that such discounts are obtained by intimidation on the part of Blue Cross—that a refusal to pay for hospital services to its subscribers by one who dominates the field of hospital benefit plans, except on discriminatory terms, constitutes an act of "boycott, coercion and intimidation." Blue Cross counters that its acts are unassailable because they are mandated by the Insurance Commissioner of Pennsylvania. The doctrine enunciated in Weiner v. Hospital Service Plan, 13 Pa. Dist. & Co. R.2d 689, aff'd. per curiam in 187 Pa. Super. 244, 144 A.2d 575, however, to the effect that a statute requiring prior approval by a state insurance department of a non-profit hospitalization plan does not authorize the department to grant a monopoly to any one such corporation, compels the corollary that the department cannot thereby validate monopolistic practices by any one corporation. That all insurance industry acts of boycott, coercion, or intimidation condemned by the Sherman Act are subject to federal law is also clearly established in Monarch Life Insurance Company v. Loyal Protective Life Insur-

ance Company, 326 F.2d 841 (2 Cir. 1963), cert. den. 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed 2d 971.

[3] Travelers has, therefore, raised substantial factual issues concerning the competitive position and the competitive practices of Blue Cross in the insurance industry, which preclude the ascribing of McCarran Act immunity to the defendant on the present state of the record.

It is ordered that the defendant's Motion for Summary Judgment be and the same is hereby denied.

It is further ordered that on or before December 1, 1969, the parties submit a proposed pretrial order to be entered in lieu of that which was entered on April 30, 1969.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-602

THE TRAVELERS INSURANCE COMPANY,

Petitioner,

v.

BLUE CROSS OF WESTERN PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-602

THE TRAVELERS INSURANCE COMPANY,
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v.

BLUE CROSS OF WESTERN PENNSYLVANIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Blue Cross of Western Pennsylvania, respectfully submits this brief in opposition to the captioned petition and urges that the petition be denied by this Court.

Statutes Involved

Petitioner omits from its statement of "Statutes Involved" two sections of the McCarran Act, 15 U.S.C. §§1011 and 1012(a):

> §1011. "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to

impose any barrier to the regulation or taxation of such business by the several States."

§1012(a). "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Petitioner also omits the Pennsylvania statute which, relevant to the McCarran Act exemption, specifically subjects the contract between Respondent and Western Pennsylvania hospitals—characterized by Petitioner as "the center of contention in this case" (Pet. 2)*—to regulation by the Commonwealth's Insurance Department, namely, Section 1404 of the Pennsylvania Nonprofit Hospital Plan Act, 40 P.S. § 1404 (recently reenacted without material change as 40 P.S. § 6124):

"The rates charged to subscribers by nonprofit corporations, subject to the provisions of this act, all rates of payments to hospitals made by such corporations pursuant to the contracts provided for in this act, all acquisition costs in connection with the solicitation of subscribers to such hospital plans, the reserves to be maintained by such corporations, the certificates issued by such corporations representing their subscribers' agreements, and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the Insurance Department. . . ."

* "Pet." references are to the petition for writ of certiorari; "Pet. App." references are to the appendices (A or B) of the petition; "App." references are to the printed Appendix in the court of appeals; "PX" references are to Plaintiff's (Travelers) Exhibits; and "DX" references are to Defendant's (Blue Cross) Exhibits.

Question Presented

The "Questions Presented" by Petitioner bear no relation to the facts of record or to the decisions of the courts below. Indeed, Petitioner not merely ignores the factual findings and legal conclusions below, but mischaracterizes them as well.

The only point which, in Respondent's view, conceivably warrants formal Argument in this brief is the narrow point, properly rejected below:

> **whether, as the court of appeals put it, given a comprehensive scheme of "aggressive" state insurance regulation, in order "to exempt conduct from the federal antitrust laws [under McCarran], state regulation must [also] parallel the Sherman Act." (Pet. App. A 5a-6a, n.10).**

On this point, there is no room for doubt that this case does not warrant review by this Court in light of the Congressional purpose underlying the McCarran Act, the decisions of this Court, and various courts of appeals and district courts, as well as the decisions below which carefully applied the law to the specific facts in evidence.

Moreover, Petitioner, mindful that in order to prevail it must also induce this Court to hear and then reverse the holdings below that, even absent McCarran, Respondent has not violated the Sherman Act, seeks (through its "Questions" 2 and 3, Pet. 3-4) nothing less than a full review and rejection by this Court of the facts found below—which findings, as Respondent's Statement of the Case herein will make clear, ineluctably led the courts below to their correct decision. Similarly, Petitioner's Fourteenth Amendment "Question" (Pet. 4, Question 4), premised on its mischaracterization of the facts, is proffered by Peti-

tioner for a fact resolution by this Court contrary to those found below.

Statement of the Case

The petition seeks review of a unanimous judgment of the court of appeals affirming the decision and order of the district court dismissing the antitrust complaint of Petitioner, The Travelers Insurance Company ("Travelers"), one of the nation's largest commercial insurance companies, against Respondent, Blue Cross of Western Pennsylvania ("Blue Cross"), one of the five state-regulated, nonprofit hospitalization insurance plans in Pennsylvania.

The focal point of Travelers' case was the contract between Blue Cross and 101 primarily nonprofit hospitals in Western Pennsylvania, whereby hospitals are guaranteed payment from Blue Cross of their costs of providing care to Blue Cross insured patients. (Pet. App. B 13a).* Travelers alleged and still maintains here that the contract's cost-based formula of payment was the keystone of Blue Cross' monopolization of, or attempt or conspiracy to monopolize, the hospitalization insurance business in Western Pennsylvania, and rendered the contract itself in unreasonable restraint of trade, in violation of Section 2 and Section 1, respectively, of the Sherman Act.

The courts below, in holding that state regulation of the contract exempted Blue Cross from antitrust attack, and that, even absent McCarran, Blue Cross had not violated the antitrust laws (Pet. App. A 2a; Pet. App. B 23a), had the benefit of an enormous body of facts developed during a "lengthy" and "comprehensive non-jury trial" (Pet. App. A2a; Pet. App. B 12a). That trial: traced the origins and

* Similar cost reimbursement contracts are utilized by the other Pennsylvania Blue Cross plans, and by the Federal Government and the Commonwealth of Pennsylvania under Medicare and Medicaid programs, respectively (App. 637a-638a, 848a).

functioning of Blue Cross as a "community service [institution] participating in the Commonwealth of Pennsylvania's plan for the efficient maintenance of an essential community health service at the lowest possible cost to the public" (Pet. App. B 20a); and "compared" the "methods employed and the plan administered by Blue Cross . . . with the hospitalization insurance product of Travelers and 300 other commercial carriers" operating in Western Pennsylvania (Pet. App. B 22a). The conclusion drawn by the courts below was that "the completeness of [Blue Cross'] coverage" made it "considerably more attractive to consumers" and gave it "public acceptance," which led to its "superior competitive position" and "success" in providing "hospitalization insurance for 51% of the population of this area." (Pet. App. B 23a; Pet. App. A 2a, 10a).

A. Blue Cross

Prior to the formation of Blue Cross in 1937, "commercial insurance companies were doing virtually nothing in providing hospital care protection to the citizens of Pennsylvania through private insurance" (DX-494; App. 538a). This resulted in a crisis for the bulk of Pennsylvania's citizens who were unable to pay for required hospital care, and for the hospitals which were experiencing serious financial deficits (DX-494; DX-1 at 5; DX-292 at 757-764). "[T]o meet [this] public health problem" (Pet. App. B 14a) the Pennsylvania Legislature enacted the Nonprofit Hospital Plan Act of 1937 (40 P.S. § 1401 *et seq.*) "authorizing the creation of nonprofit hospital plans, now known as Blue Cross plans, which through contracts with hospitals would provide hospital services for subscribers and guarantee the payment of their hospital care." (DX-494; Pet. App. B 15a).

Built into the Nonprofit Hospital Plan Act is a system of comprehensive regulation of all material aspects of the

operations of Blue Cross by the Pennsylvania Insurance Department (Pet. App. B 14a-15a). The testimony of the current Insurance Commissioner, Herbert S. Denenberg, and two former Commissioners, as well as the extensive documentary record of more than three decades of Insurance Department regulation,* made clear that the Department has pursued as its regulatory goals that which the Commonwealth sought to achieve through the enactment of the Nonprofit Hospital Plan Act, i.e., assuring availability of the highest quality, most comprehensive health care at the lowest possible cost; and, further, that the Insurance Department has translated these goals, "in strict conformity with" the Act, into a consistent pattern of regulation and control over the operations of Blue Cross, with particular emphasis on subscriber rates and the manner of Blue Cross reimbursement of hospitals which directly affects such rates (Pet. App. B 14a, 17a-21a; Pet. App. A 6a).

The record is likewise crystal clear that Blue Cross has served a community health function. Initially, it makes available to all segments of the Western Pennsylvania community, good risks and bad risks alike, full service benefit insurance coverage at the lowest possible cost (Pet. App. A 9a-10a; App. 452a, 542a-543a; DX-1 at 8). Thus, Blue Cross accepts an open-ended risk by guaranteeing payment for needed care regardless of how extensive and costly it might be, automatically including use of new medical techniques and equipment (Pet. App. A 10a; App. 544a, 760a-761a). While Blue Cross subscriber contracts vary as to the

* App. 761a *et seq.*, 659a *et seq.*, and 923a *et seq.;* DX-5 through DX-93; DX-98; DX-109; DX-173; DX-190; DX-192; DX-512, 513; DX-801, 802; DX-805, 806, 807.

specified number of days of coverage, the periods are so liberal that in more than nine cases out of ten all inpatient claims are covered in full (App. 544a).

Additionally, in Blue Cross' effort "to treat the whole community as a unit in need" (App. 452a), its rates are structured to bring the cost of comprehensive coverage within the means of the community—so that the burden is not borne entirely by any one segment, but rather is spread across as large a cross-section as possible. As a result, while the portion of each Blue Cross premium dollar paid out in hospital benefits has averaged between $.93 and $.95 overall, Blue Cross has paid out an average of $1.05 in benefits for every dollar of premiums received from its poor risk subscribers, enrolled as individuals or members of small groups (App. 548a, 551a). Over the period from 1960 through 1970, the subsidization of these poor risks has amounted to over $27,000,000 (Pet. App. A 3a, n.8; App. 700a-701a).

The means by which Blue Cross since 1937 has made such benefits available to the community, and at the same time placed hospitals in a stable financial condition, is through contracts with hospitals; and the means by which the Commonwealth seeks to accomplish its goals is through regulation of the hospital contract to ensure that it will bring about high quality care at the lowest possible cost to the public (App. 659a-678a, 767a-770a; DX-801, 802).

Thus, when Blue Cross and the hospitals conducted their "exhaustive negotiation" on a new contract, (Pet. App. B 20a) it had been "made abundantly clear" by the Insurance Department that the contract had to be based on hospital costs, limited by a cost control ceiling (Pet. App. B 18a-19a; Pet. App. A 6a),* and that *not* includible in the reimbursement formula were expenses not incurred by reason of ser-

* App. 675a-683a, 571a-573a, 593a-594a.

vices to Blue Cross patients, such as amounts attributable to free care and defaulting patients, or for new construction or capital expansion (Pet. App. B 19a; Pet. App. A 6a; App. 667a-668a, 774a-779a; DX-40 at 19; DX-98 at 4). "Within these guidelines" the parties arrived at a consensus that satisfied their "mutual needs and responsibilities . . . as community service institutions" (Pet. App. B 19a-20a). And the contract which resulted was approved by the Insurance Department (Pet. App. B 17a).

The chief advantage to hospitals is the contract's guarantee that the hospitals will be paid promptly their cost of providing care to Blue Cross subscribers for the duration of their contracts (App. 636a-637a).* This guarantee is particularly meaningful to hospitals because it is coupled with the assurance that Blue Cross' comprehensive service benefit coverage to subscribers will enable hospitals to recover their costs with respect to the full range of services necessary for patient care (App. 548a-549a). Further, since nearly all Blue Cross member hospitals are nonprofit institutions, they are guaranteed receiving from Blue Cross that which they only *hope* to receive from non-guaranteed patients, such as policyholders of commercial insurers or self-insured persons (App. 636a, 847a-848a). Hospitals recognize that such non-guaranteed patients do not always *pay* the amount *billed* and, therefore, the actual amount the hospitals receive therefrom does not equal the hospitals' *charges*, and may not even equal *cost* (App. 355a, 828a-829a). Thus the district court's finding that: "In order to

* As the court of appeals noted: "If a hospital refused to agree to the contract, Blue Cross would reimburse the hospital on a per diem basis by an amount insufficient to cover the hospital's costs. A hospital would have to make up any deficiency by charging the patient directly. We note that this procedure is typical of the indemnification plans offered by private insurance companies." Pet. App. A 7a, n.12.

cover their financial requirements not incurred by reason of services to Blue Cross subscribers—such as the cost of services to indigent and defaulting patients—the same hospitals charge policyholders of Travelers and other commercial carriers an average of 14% more for their services than they accept as full payment from Blue Cross." (Pet. App. B 13a; and see Pet. App. A 3a, 6a).

B. The Comparison Between Blue Cross and the Commercial Carriers

By Travelers' own admission, "Blue Cross at one time enjoyed a virtually complete monopoly, due to the simple fact that no commercial insurers were prepared to enter the field of hospitalization coverage" (App. 855a). Even as the decade of the 1940's came to a close, while commercial insurers had begun writing limited dollar indemnity policies, they were not interested in writing full service benefit coverage due to the open-ended nature of the risks involved; and they "were unwilling to take that risk" with respect to such coverage bargained for by large trade unions, who then turned to Blue Cross (App. 856a, 858a-861a, 902a, 914a-917a).

Notwithstanding consumer preference for full service benefit coverage, and that prospective purchasers recognize "[f]ull service benefits are definitely an advantage to an employee . . .", Travelers and the commercials continue to be reluctant to duplicate and underwrite Blue Cross-type full service coverage; for it is Travelers' view that the "better principle"—for Travelers—is policies with "dollar limits" (App. 168a-169a, 861a, 902a, 914a-917a).

This principle is not "better" for the many citizens of Western Pennsylvania who are simply unable to obtain full service coverage from Travelers and other commercials

who consistently refuse to provide such coverage to individuals, and members of small groups, and even discourage full service coverage for larger groups (App. 948a, 83a, 131a, 902a, 914a-917a). As the court of appeals noted: "It appears that Blue Cross is still alone in offering this arrangement to small groups and to high-risk individuals" (Pet. App. A 10a, n.15). Accordingly, Blue Cross' offer of full service benefit coverage to all segments of the Western Pennsylvania community has attracted hundreds of thousands of people who could not get such coverage elsewhere.*

In those instances where the consumer has a free choice, Blue Cross' reputation is now such that Travelers' own witness

> "could say without fear of contradiction that if we are talking about a bargaining group of employees and they were given a choice, again, especially in this particular area, I refer to Western Pennsylvania, the bargaining employee would opt for Blue Cross." (App. 111a).

In addition, the underwriting policies of the commercials have not been in the best interests of the hospitals. Commercial coverage has traditionally been so inadequate that another Travelers witness observed that hospitals do not even consider individually insured patients with commercial coverage as being insured at all since the hospitals have great difficulty in collecting the bills rendered to such patients (App. 355a). Thus, beyond the fact that Travelers and other commercials have not sought to contract

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* Approximately 21% of Blue Cross subscribers (almost half a million people) are insured as individuals (PX-2) and over 72% of Blue Cross' groups are made up of less than 15 persons (DX-544(2)).

with hospitals,* even if they had, any guarantee of payment would have had little meaning due to their restrictive underwriting practices (App. 362a-364a, 814a-818a). And on this point, the court of appeals noted that Travelers' own evidence

> "suggests not that Travelers was unable to obtain any price reduction from hospitals, but rather that Travelers assumed its inability to do so and, therefore, did not press the matter. Moreover, it is not clear that Travelers was willing to adopt a full-cost reimbursement scheme comparable to that of Blue Cross (as opposed to the typical indemnification arrangement) as a quid pro quo." (Pet. App. A 9a, n.13).

It was against this background that the courts below denied Travelers the mandate it sought which would displace the regulatory policies of Pennsylvania. For, as Insurance Commissioner Denenberg pointed out in his testimony, a holding in support of the position urged by Travelers would substantially impair the Commonwealth's ability to effectively regulate Blue Cross and control spiralling hospital costs, and prevent the state from realizing the basic public policy goals underlying its regulatory scheme (App. 762a-763a).

C. The Decisions Below

The courts below not only applied the McCarran exemption to Blue Cross' challenged activity (treated in the Argument herein), but went on to decide, as the court of appeals put it: "Even if the McCarran-Ferguson Act were inapplicable and Blue Cross was subject to antitrust scru-

* App. 861a-863a, 936a, 945a, 814a-818a; save for Metropolitan, which entered into contracts with two hospitals in Western Pennsylvania (App. 117a-118a).

tiny, we agree with the district court that Blue Cross could withstand such scrutiny." (Pet. App. A 7a).

1. *Section 2 of the Sherman Act*

With respect to Travelers' allegations of monopolization or attempted monopolization, the district court initially rejected Travelers' contention that Blue Cross possessed, or could obtain, the requisite "monopoly power"—the "power to control prices or exclude competition." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). The district court found not only that "300 other commercial carriers" had entered the Western Pennsylvania hospitalization insurance market (Pet. App. B 22a)* but that Blue Cross—caught in a squeeze between Insurance Department regulatory pressure to keep subscriber rates as low as possible and rising hospital costs pressuring such rates upward**—"is not a monopolist, for it not only lacks control over the rate-making effects normally incident to lawful competition, but it is without power to establish its own rates." (Pet. App. B 23a).

On this score, the court of appeals, while it said "we have not reached the determination of whether Blue Cross possesses enough market power*** to have 'monopoly power',"

* That their entry has been successful is evidenced by their coverage of many of the largest accounts in the area such as Alcoa, Allegheny Ludlum, Republic Steel, Westinghouse and others (App. 101a-103a, 176a-181a, 73a-75a).

** App. 767a, 555a, 664a; DX-62; DX-68; DX-192.

*** Contrary to Petitioner's assertions here and below, neither the district court nor the court of appeals found Blue Cross to have a "market share" of 62%. The district court referred only to the percent of "hospital days of service" (Pet. App. B 12a-13a), or "patient days" as the court of appeals put it (Pet. App. A 2a), received by Blue Cross subscribers on the one hand and commercially insured persons on the other. The court of appeals noted that "There were also patients who qualified for Medicare or Medic-

(Pet. App. A 7a), made the following statements (at Pet. App. A 8a, 9a): "the size of its competitors does not give Blue Cross the freedom to conduct other than fair competition for business;" and "there is no reason to suppose that, even if commercial insurers such as Travelers were currently unable to compete with Blue Cross,* they could not immediately re-enter the hospitalization insurance business if it became profitable to do so."

Further, in regard to Sherman 2's requisite of *willful* acquisition or maintenance of monopoly power, or *specific intent* to acquire it, *as distinguished from* growth or de-

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aid, etc. or who were not covered by any form of reimbursement . . . ." (Pet. App. A 2a, n.6). Complete "patient day" data, reflected in undisputed documentary evidence, discloses that Blue Cross patients received less than ⅓ of the hospital days of service for *all* types of patients (Exhibit C-1 of DX-540, 541 and 542a). See also *Hiland Dairy, Inc.* v. *Kroger Company*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

* Contrary to Travelers' assertion (Pet. 7) that it is "virtually impossible" for Travelers and the commercials to compete against Blue Cross, the commercials can, when they choose, effectively compete.

Unlike Blue Cross, which is a specialist in hospitalization, Travelers and the commercials have the advantages of underwriting and selling a package of Accident and Health benefits (of which hospitalization is but one segment) as well as other coverages. Such advantages include retention savings reflected in a lower combined rate on the package and the ability to cross apply funds within a combined rated package—thereby, the commercials seldom have to meet a Blue Cross rate head-on, and can insulate themselves from competition from such a single line carrier. Thus, the commercials many times have quoted rates lower than Blue Cross; at times the rates have been comparable; and even where Blue Cross' rates were lower, the commercials have retained or obtained the coverage of many large accounts (App. 159a, 163a-164a, 171a, 176a-181a, 468a).

Indeed, there was proved no net loss of business by Travelers as a direct result of Blue Cross' hospital cost reimbursement. Whereas Travelers has lost two accounts to Blue Cross, Blue Cross has lost two to Travelers (56a, 86a-87a, 893a-894a, 896a, 899a; DX-350 at 1; DX-297; DX-309).

velopment as a consequence of a superior product, business acumen, or historic accident,* the district court found that the "overriding motive" and "manifestly legitimate purpose" of Blue Cross (and the hospitals) in arriving at the hospital contract was implementation of the "Commonwealth . . . plan for the efficient maintenance of an essential community health service," under state regulation, at "the lowest possible cost to the public." (Pet. App. B 20a-21a). And the district court further found such motive and purpose to be untainted by any boycott, coercion, intimidation or restraint of trade (Pet. App. B 21a-23a). Rather, the district court found that, in *comparing* what Blue Cross offers the community with what Travelers and the commercials offer, "whatever share of the hospitalization insurance market Blue Cross enjoys is the result of public acceptance," and that the resulting "[c]ommunity attraction" to Blue Cross and its "economic appeal" lent "credence to Blue Cross' 'thrust upon' defense. . . ." (Pet. App. B 23a).

The court of appeals "[agreed] with the district court's determination that Blue Cross achieved its present status in a permissible manner," (Pet. App. A 9a), stating:

> "The district court found, on ample evidence, that Blue Cross owes its success to the completeness of its coverage. From the time of its organization in the late 1930's, Blue Cross has reimbursed hospitals for all covered services rendered its subscribers. Private companies, on the other hand, have, until relatively recently, provided only that their policyholders would be indemnified up to a set dollar ceiling. Blue Cross thus has exposed itself to considerably greater risk because of the

* *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States* v. *Griffith*, 334 U.S. 100, 105-06 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 784-85 (1946).

> possibility that treatment would be extensive and because of the probability that hospital costs would rise. By shouldering the risk, Blue Cross has made itself considerably more attractive to consumers. The antitrust laws were not intended to condemn such conduct." (Pet. App. A 10a).

And thus, the court of appeals, quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), concluded that Blue Cross' arrangement with hospitals did *not* constitute "'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'." (Pet. App. A 7a).

2. *Section 1 of the Sherman Act*

Both courts below, contrary to Petitioner's assertions, properly applied the "rule of reason" to the situation here. The court of appeals stated: "as the district court indicated, it must be carefully looked at on its own facts, in order to reveal whether any restraint of trade it causes is 'reasonable.' *See Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4-5 (1958); *cf. Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918)." (Pet. App. A 8a). This is precisely what the district court did in reaching its conclusions that "Travelers has not met its burden with respect to the issues of . . . restraint of trade" (Pet. App. B 22a), and that there was an absence of "any artificial restraint-of-trade practices" on Blue Cross' part (Pet. App. B 23a).

Following the path set down by this Court in *Chicago Board of Trade*, the district court "tested for unreasonable-restraint-of-trade characteristics" the "contract itself . . . as well as the setting in which it originated" (Pet. App. B

17a), which has been detailed above; and weighed also that Blue Cross never tried to influence the relationship between hospitals and Travelers or other commercials, "much less any inducement to the hospitals not to deal with Travelers" and the commercials (Pet. App. B 22a-23a)—a finding which, as the court of appeals noted, "Travelers has not challenged" (Pet. App. A 6a-7a).

In this connection, the court of appeals also noted that:

> "In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every rational enterprise does, i.e., get the best deal possible. This pressure encourages hospitals to keep their costs down; and, for its own competitive advantage, Blue Cross passes along the saving thus realized to consumers. To be sure, Blue Cross' initiative makes life harder for commercial competitors such as Travelers. The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned." (Pet. App. A 8a).

And in distinguishing, "both as to practices involved" and their "context", the case relied upon by Petitioner below, as well as here, *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949), the court of appeals observed:

> "In addition to its aggressive bargaining over price, A. & P. was also found to exert pressure on suppliers either not to deal or to alter their dealings with A. & P.'s competitors. No comparable conduct was shown here. In fact, the evidence does not support the proposition that Travelers or other companies could not have achieved some price reductions. Moreover, A. & P. was found to have engaged on several occasions in preda-

tory pricing. . . . Here, in contrast, there was no evidence of predatory pricing." (Pet. App. A 8a-9a).*

3. *The Fourteenth Amendment*

As to this claim, the court of appeals said it had "little merit" (Pet. App. A 11a) and could "be disposed of quickly" (Pet. App. A 10a), essentially on any one of three grounds. *First,* "it is questionable whether [Travelers'] . . . belated presentation properly raised the issue before the district court so as to make consideration here proper. See *Andrews* v. *Chemical Carriers, Inc.,* 457 F.2d 636 (3d Cir. 1972)." (Pet. App. A 11a). *Second,* in view of the simple fact that Blue Cross had never been accorded a favored position—rather, it has had to assume, under state supervision, a heavy responsibility to the community (as well as to the hospitals) which Travelers and the commercials have opted not to assume—the court of appeals stated: "In view of our holding that, independent of the McCarran-Ferguson Act, the antitrust laws were not violated, the state of Pennsylvania has not denied Travelers equal treatment in violation of the Fourteenth Amendment." *(Id.)*

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* It was in this light that the courts below refused to accept Travelers' premise which, disregarding these relevant facts, theorized that because Blue Cross has a cost reimbursement contract and Travelers is at a "substantial price disadvantage," *ipso facto* the contract is in unreasonable restraint of trade. This argument, beyond the blinders it places on the entire "setting," wars with the facts that not only has Blue Cross done nothing to prevent any commercial carrier from contracting with hospitals, but that Travelers has not even seriously sought to contract with them on any basis.

Beyond that, contrary to Travelers' representations to this Court, *neither* of the courts below found that the contract's effect upon competition was "detrimental" (Pet. 18) or had a "suppressive effect upon competition" (Pet. 19). Further, contrary to the findings and record below is Travelers' assertion here (Pet. 21) that "there is no reasonable justification" for the alleged "discount" flowing from the hospital contract.

Finally, **in response to Travelers' simplistic approach which (contrary to the clear expression of reasonable legislative purpose underpinning the Nonprofit Hospital Plan Act, and its administration)** ***assumed*** **an unconstitutional classification** ***without*** **the indispensible** ***proof*** **of its arbitrariness, the court of appeals concluded: "even if McCarran-Ferguson Act protection were necessary to Blue Cross, the facts do not support the proposition that Pennsylvania's regulation of the contract between Blue Cross and the hospitals was without rational purpose,** *see,* **e.g.,** *James* **v.** *Strange,* **407 U.S. 128 (1972)."** *(Id.)**

ARGUMENT—The McCarran Act Question

Contrary to Petitioner's assertions, this case presents no novel and significant question warranting review by this Court, nor does the decision below conflict with any applicable decision of this Court or of any court of appeals or district court. Rather, the McCarran Act "Question" was decided below consistent with the Act, the decisions of this Court and of other federal courts on the strength of the unique set of facts established in the massive record of this case.

I.

As the district court observed, Travelers' "target is the heart of the Blue Cross plan—the hospital contract." (Pet. App. B 17a). But, the Commonwealth, by statute, has specifically subjected that very "target" to regulation, vesting in the Insurance Department the power to regulate "rates

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* See also *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *Morey* v. *Doud,* 354 U.S. 457 (1957); *Hoopeston Canning Co.* v. *Cullen,* 318 U.S. 313 (1943); *German Alliance Ins. Co.* v. *Lewis,* 233 U.S. 389 (1914); *Lindsley* v. *Natural Carbonic Gas Company,* 220 U.S. 61 (1911).

charged to subscribers by nonprofit corporations . . . rates of payments to hospitals made by such corporations pursuant to the contracts provided for in this act, . . . and any and all contracts entered into by any such corporation with any hospital. . . ." 40 P.S. § 1404.*

Under the statute, Pennsylvania's Insurance Department, over the years and to this day, has consistently sought as its major regulatory goals: to assure that Blue Cross provides the highest quality, most comprehensive health care coverage at the lowest reasonable price; and to bring about a hospital contract that, in turn, guarantees the delivery of such care at the lowest reasonable cost. These goals have been developed into a consistent pattern of regulatory direction and control over Blue Cross, particularly its contractual relationship with hospitals, subscriber rates and benefits. This regulation has not only taken the form of hearings, approvals or disapprovals, but also of a vigorous program of policymaking and action, made known not only to Blue Cross, but to the community at large, including the hospitals.**

It was against this background—in contrast to Petitioner's characterization that the hospital contract is subject only to the "general" supervision of the Insurance Commissioner—that the district court, in holding Blue Cross entitled to the McCarran exemption, found: "the activities of Blue Cross in all respects material to this case, including

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* Failure to comply with the regulatory scheme contained in the Act or with any order of the Insurance Department made pursuant to the Act carries with it the risk of criminal penalties. 40 P.S. § 1409 (reenacted as 40 P.S. § 6105).

** Pet. App. B 18a-21a; App. 382a-383a, 450a-452a, 541a-542a, 544a-546a, 554a-565a, 572a-573a, 588a-591a, 593a-594a, 600a-604a, 610a, 659a-684a, 761a-780a, 795a-802a, 929a-931a; DX-4, 5; DX-37; DX-40; DX-43; DX-49; DX-68; DX-68a; DX-93; DX-98; DX-109; DX-113; DX-192; DX-510, 511, 512, 513; DX-801, 802.

the terms of the contract under attack, are regulated and directed by the Insurance Department . . . in strict conformity with the provisions of the Non-profit Hospital Plan Act. . . ." (Pet. App. B 14a); and "all Blue Cross activities of which Travelers complains occur within the area of state-regulated insurance business. . . ." (Pet. App. B 16a). And as the court of appeals stated, after quoting the relevant provisions of the Nonprofit Hospital Plan Act:

> "One recent case suggests that the mere existence of such a scheme of regulation, even if ineffective and unenforced, is sufficient to invoke the McCarran-Ferguson Act. *Ohio AFL-CIO* v. *Insurance Rating Board*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). However that may be, the record here shows aggressive state regulation. In fact, as the district court found, the features of the contract which Travelers finds objectionable were mandated by Insurance Department guidelines designed to encourage high quality care at reasonable cost." (Pet. App. A 6a).

Such findings, underlying the decisions below, as to a specific state statutory scheme of regulation of a specific practice of a Pennsylvania Blue Cross plan, and aggressive administrative enforcement by Pennsylvania's Insurance Department, further belie Petitioner's assertions of the nationwide impact which the decisions below would have on the multitude of imagined activities by "all insurance companies." (Pet. 3).

II.

Petitioner, unable to contest the fact of comprehensive regulation, sought below, as it does here, to superimpose upon McCarran the wholly unsupportable requirement that it applies only if state regulation is clothed in the garb of

antitrust enforcement. In response, the court of appeals stated:

> "We reject Travelers' argument that, to exempt conduct from the federal antitrust laws, state regulation must parallel the Sherman Act. Had Congress desired this type of regulation, it could simply have continued the applicability to insurance companies of the Sherman Act itself. Moreover, that Congress intended to allow the states to regulate insurance on the basis of factors other than competition is conclusively demonstrated by the McCarran-Ferguson Act's immunization of rate-fixing." (Pet. App. A. 5a-6a, n.10).

This rejected argument of Petitioner finds no support in the law; and none of the cases cited by Petitioner (Pet. 14-17) so hold.* Rather, in those cases, the courts deter-

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* Of the 9 McCarran cases cited at Pet. 14-15, only 4 even mention the *form* of regulation: In *Professional and Business Men's Life Ins. Co.* v. *Bankers Life Co.*, 163 F.Supp. 274 (D.Mont. 1958), the question of whether McCarran requires antitrust-type regulation was not even at issue, for plaintiff there conceded that the exemption would apply if the State of Montana provided for antitrust-type regulation of the life insurance business. The court found such regulation present and dismissed the complaint on the basis of the concession. *Id.* at 278-79.

In *Miley* v. *John Hancock Mut. Life Ins. Co.*, 148 F.Supp. 299, 302 (D.Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957), the court held the exemption applicable where the state "provides a statutory scheme of [non-antitrust] regulation covering the very transaction complained of here." The fact that the state also had a statute regulating unfair methods of competition in the insurance business was only "an additional ground" for exempting "the transaction" under McCarran. *Id.*

In *United States* v. *Chicago Title and Trust Co.*, 242 F.Supp. 56 (N.D.Ill. 1965), under attack was a corporate acquisition involving competing insurance companies actively doing business in many states. The key to the case is that there simply was "no Missouri statute or regulation regulating the acquisition by a foreign title insurance company [Chicago Title and Trust] of the stock of a domestic title insurance company [Kansas City Title]." *Id.* at 59. Beyond that, were the case decided today, the teachings of *S.E.C.*

mined whether the substantive *activity* under attack, *not* the competitive *effect* thereof, was regulated by the state; and thus, not determinative was the antitrust form of complaint, nor the form the regulation took.

A federal court's path in rejecting Travelers' argument is guided by the basic purpose of the Act to stay the federal hand. As Senator Ferguson, the co-sponsor of the bill that became the McCarran-Ferguson Act, explained:

> "under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. That is exactly what we attempted to do in the bill. It is clear what we attempted to do." 91 Cong. Rec. 1481 (1945).

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v. *National Securities, Inc.*, 393 U.S. 453 (1969), would expose the acquisition under attack as a purely corporate activity basically unrelated to the "business of insurance."

And in *Sanborn* v. *Palm*, 336 F. Supp. 222 (S.D. Tex. 1971), involving an alleged tying agreement, the court, without referring to or negating the significance of state insurance regulation, if any, immediately seized on the Texas antitrust statutes as covering the alleged activity, and concluded that McCarran "deprived" the court "of Sherman Act jurisdiction." *Id.* at 228.

Similarly, the *Zachman, Sears, Roebuck,* and *Atlantic & Pacific Insurance* cases cited by Petitioner (Pet. 16-17) do not hold, as Petitioner contends, that McCarran requires "a state regulatory statute to . . . give a private right of action to persons injured. . . ." (Pet. 16). It should be noted that Travelers' remedy was to challenge the Insurance Commissioner's action in state court, a step which Travelers never took; nor did Travelers ever register any complaint of Blue Cross activity with the Insurance Department, or seek to participate in any Insurance Department hearing on hospital reimbursement.

Thus, soon after the McCarran Act's passage, this Court, in *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 429-30 (1948), reviewed the relevant legislative history, and found that:

> *"Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating . . . the business of insurance. . . .*
>
> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and *its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.*" (Emphasis added).

Consequently, this Court concluded in *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 68-69 (1959):

> "We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of 'insurance,' they speak with the authority of a long tradition. For the regulation of 'insurance,' though within the ambit of federal power . . . has traditionally been under the control of the States."

Accordingly, the lower courts have held that:

> **"The McCarran-Ferguson Act does not prescribe a specific form of regulation to be adopted by the states. It is enough that the state should generally regulate the business of insurance by providing general standards of conduct and providing procedures for effectuating those standards. . . . To satisfy the requirements of the McCarran-Ferguson Act, state procedure need not be what plaintiff, or the courts, think is the wisest or the most effective type of regulation." *Fleming* v. *Travelers Indemnity Co.*, 324 F.Supp. 1404, 1406 (D.Mass. 1971).**

And,

> **"Under the terms of the Act, only when a state has not acted, would federal legislation become effective." *Hamilton Life Insurance Company* v. *Republic National Life Insurance Company*, 408 F.2d 606, 611 (2d Cir. 1969).**

Under McCarran, then, unlike instances where a court must divine the scope of *implied* exemption and attempt to strike a balance between federal antitrust interests and non-antitrust regulatory concerns (in the cases relied upon by Travelers, Pet. 16, such as *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-61 (1963)), we deal here with a clear-cut case of Congress *expressly* staying the federal antitrust hand in favor of state regulatory policies over the business of insurance. And certainly McCarran must apply here, as in *Miley* v. *John Hancock Mutual Life Insurance Company*, 148 F.Supp. 299, 302 (D.Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957), where there is "a statutory scheme of regulation covering the very transaction complained of. . . . [W]hat was done

here by the defendants . . . was . . . in the course of negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided that the Sherman Act shall not apply."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-602

THE TRAVELERS INSURANCE COMPANY,
Petitioner,

v.

BLUE CROSS OF WESTERN PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's ("Blue Cross's") brief demonstrates the critical importance and novelty of the issues raised by the petition for certiorari filed by The Travelers Insurance Company ("Travelers"). In this reply brief, Travelers will address the arguments first raised in the respondent's brief.

The position taken by Blue Cross in opposition to the Travelers' petition for a writ of certiorari is basically that the Blue Cross system is good for a great number of people, gives broader and better coverage than commercial insurance, was first on the scene,

solved a serious problem, provides a vehicle which helps to hold down hospital costs, is cheaper than commercial insurance, represents a policy endorsed by the State Legislature, and consequently is exempt from the Sherman Act under the McCarran exemption and does not violate the Sherman Act because the dominance of Blue Cross is a result of public acceptance.

Whether or not these conclusions are true, they are not legal arguments. They are arguments which should be addressed to the Pennsylvania legislature to gain support for a bill directly granting Blue Cross a monopoly and specifically authorizing it to conduct anticompetitive practices. Pennsylvania courts have held that Blue Cross does not now have a statutory monopoly. *Weiner v. Hospital Service Plan,* 13 D. & C. 2d 689 (1958), *aff'd,* 187 Pa. Superior Ct. 244 (1958). No Pennsylvania statute grants Blue Cross a monopoly.

Obviously, if Blue Cross is to sweep the field so that 100% of hospital patients are either Blue Cross patients or Medicare patients, then there will be no source of patients from which to extract by higher charges the roughly 14% extra needed to sustain the hospitals' full operation, i.e., to pay for indigent and non-paying patients and to build up reserves for expansion. The effect, therefore, on the community if Blue Cross achieves a complete monopoly will be most significant. It is, therefore, in the national interest that there be a clear legal decision on these issues and not a mere popularity vote for or against the Blue Cross system.

ARGUMENT

I. This Court Should Grant the Petition in Order to Determine Whether Blue Cross's Dominant Market Position Is Justified Because That Position Is "Thrust Upon" Blue Cross by Actions of the Pennsylvania Insurance Commissioner.

Blue Cross devotes at least one-third of its brief to a statement of its version of the facts. Blue Cross pictures itself as a small community service enterprise which provides full service benefits to the people of Western Pennsylvania. It argues that its dominant position in the private hospital insurance market is due to the extent of its benefits and to the fact it will insure high-risk persons and others who cannot obtain full-service hospitalization coverage from commercial carriers.

In making this argument, Blue Cross, like the courts below, has oversimplified the case and ignored a substantial body of law. The case raises the question of whether Blue Cross's obtaining a discount is a violation of the Sherman Act. The fact that Blue Cross is able to use the discount to increase the scope of insurance benefits and to provide coverage to high risk groups may be true, but these circumstances are clearly irrelevant under the antitrust laws. The fact that an antitrust violation enables a competitor to offer a certain service to the community does not provide a justification for the antitrust violation. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 447 U.S. 521 (1954).

This case focuses on the fact, undenied by Blue Cross, that the discount results in a discrimination

among hospital patients according to the type of insurance they have. A commercially insured patient who is hospitalized for an appendectomy is charged more by the hospital than the hospital charges Blue Cross when the exact same services are provided to one of its subscribers. Petition, App. B, 13a. This discrimination is solicited by Blue Cross, granted by the hospitals, and approved by the Pennsylvania Insurance Commissioner, without any regard to its impact on competition. It is Travelers' position that this discrimination, which leads ultimately to Blue Cross's dominant market share, is illegal under the antitrust laws and without rational foundation under the Fourteenth Amendment.

Travelers has raised what it deems to be valid legal arguments on issues which should be resolved by this Court. Blue Cross's repeated reference to its history of community service does not meet Travelers' arguments or deny the importance of issues raised by Travelers. The facts remain that Blue Cross enjoys a 62% share of the relevant market; it also enjoys a 14% discount in the cost of hospital care, which discount is not available to its commercial insurance competitors or their policyholders; its competitors, which account for the remaining 38% of the relevant market, each have only an infinitesimal market share when compared with that of Blue Cross.*

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*In *United States v. Besser Mfg. Co.*, 96 F. Supp. 304 (E.D. Mich. 1951), *aff'd*, 343 U.S. 444 (1952), the court said, "When two closely related corporations have 65 per cent of the dollar value of any industry and the balance is divided between over 50 other manufacturers with the nearest competitor having less than 8 per cent of the whole, we believe that such a combination has to all intents and purposes a monopoly within the meaning

The courts below have found that the Pennsylvania Insurance Commissioner dictated the terms of the hospital contract which result in Blue Cross's obtaining the discount. The discount results in Blue Cross's dominant market position. The question which Travelers asks this Court to resolve is whether Blue Cross's dominant market position is defensible on the ground that its position was indirectly "thrust upon" it by actions of the Pennsylvania Insurance Commissioner.

II. This Court Should Grant the Petition in Order to Interpret and Harmonize the Conflicting Aims of the McCarran Act — To Preserve State Regulation of the Business of Insurance and to Protect Competition.

Though many cases have arisen under the McCarran Act, no case has dealt with the manner in which antitrust remedies are integrated with state regulations. The McCarran Act clearly legitimatized state regulation of the interstate business of insurance and, to a certain extent, made state regulation primary over federal regulation of that business. It was not its purpose, however, to destroy any rights to remedies for anticompetitive behavior.

The conflicting purposes of the McCarran Act are indicated in its reference to state regulation on the one hand and the Federal antitrust laws on the other. The

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of the law." 96 F. Supp. at 307. See also *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, 1091, 1094 (D. Md. 1969) (market share of 52.6%-67%) and *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 483 (E.D. Mo. 1965), *aff'd*, 368 F. 2d 679 (8th Cir. 1966) (market share of 55%-60%).

Act was passed in 1945 as the result of a compromise between the insurance industry, whose chief spokesman was Senator Ferguson, and those interested in strict antitrust enforcement, whose chief spokesman was Senator Pepper. Out of the compromise, the insurance industry got the provision which maintained state regulation over the business of insurance, which had then recently been held to be in interstate commerce. *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944). Out of the same compromise, the group interested in antitrust enforcement got the provision that the states would be given three years in which to regulate the competitive behavior of the business of insurance, and, to the extent that the state failed to do so, the Federal antitrust laws would apply to that business. 91 Congressional Record 1442-4, 1477-89.

Travelers raises here for the first time the question of how antitrust remedies are to be harmonized with state regulation of the business of insurance. The principle advanced by Travelers and implied in the many cases cited in Travelers' petition (pp. 14-15) is that the right to a remedy under the Sherman Act is destroyed under the McCarran Act only if the state has undertaken to regulate competitive behavior. Under this arrangement, a victim of anticompetitive behavior would first consider whether he had a cause of action under state law, but if the state failed to regulate the competitive behavior and to provide a remedy for violation of the regulation, the victim would retain a cause of action under the Sherman and Clayton Acts. As one Senator said in support of the McCarran Act during the debate concerning its passage, "[I]nsofar as the States step into the picture affirmatively and act by regulation,

they may do so. . . . Insofar as they fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again." 91 Congressional Record 1444. With respect to Blue Cross, there is no Pennsylvania statute which "covers the same ground covered by the Sherman Act."*

Blue Cross's argument on this novel point fails to harmonize the conflicting aims of the McCarran Act — to preserve state regulation of the business of insurance and to provide comprehensive antitrust remedies. Under Blue Cross's interpretation, Travelers is left with no forum or remedy under either state or Federal law: the Insurance Commissioner, who has no statutory power over the competitive behavior of Blue Cross, can-

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*Blue Cross's brief incorrectly states Travelers' position regarding the kind of state regulation necessary under the McCarran Act to produce antitrust immunity. It is not Travelers' position that the state regulation must be "clothed in the garb of antitrust enforcement." Respondent's Brief, pp. 20-21.

It is the intent of the McCarran Act that state regulation must be addressed to the issue of competitive behavior. The state regulation might address the problem by eliminating competition — by, for example, permitting insurance rating bureaus to fix prices under a state regulated procedure. But by addressing the issue of competition, even in this way, the state would have, in the Senator's words, "covered the same ground as the Sherman Act." If the state fails to address the issue of competition, the Sherman Act would apply. As stated in the McCarran Act, "the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b).

Pennsylvania's regulation of Blue Cross does not extend into the area of regulation of competition. Therefore, the Federal antitrust laws apply to Blue Cross.

not hear the case; the state regulations applicable to Blue Cross do not deal with the problem of competition and do not provide remedies for victims of Blue Cross's anticompetitive behavior; the Federal antitrust laws are not available, according to Blue Cross's argument, because the state does regulate certain features of Blue Cross's operations.

It was not the purpose of Congress in passing the McCarran Act to permit insurance entities to engage in unregulated anticompetitive behavior. This Court should hold that because the competitive behavior of Blue Cross is not regulated by the state, that behavior is subject to the Federal antitrust laws. The McCarran Act exempts the business of insurance from the Federal antitrust laws only to the extent that that business is regulated by state law.

This case brings to the Supreme Court a question which has been frequently asked but never answered: What kind of regulation is necessary to satisfy the requirements of the McCarran Act so that state regulation may be predominant while the objectives of the antitrust laws are not thwarted?

CONCLUSION

To resolve the important and novel issues raised by this case, the Supreme Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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